TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 825.

THE GULF AND SHIP ISLAND RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED JUNE 12, 1899.

(17,441.)

(17,441.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 327.

THE GULF AND SHIP ISLAND RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1899.

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1 Supreme Court of Mississippi, March Term, A. D. 1899.

Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court-room, in the capitol, in the city of Jackson, on the first Monday, the sixth day, of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable Thomas H. Woods, chief justice, and the Honorable Albert H. Whitfield and the Honorable S. H. Terral, associate justices; E. W. Brown, clerk of said court, in person and by C. C. Campbell, his deputy; Thomas J. Wharton, marshal, and Thomas Grant, porter.

Proclamation being made, court proceeded to the dispatch of business.

Among other cases considered and determined by said supreme court was the following, to wit:

2 *Caption.*

THE STATE OF MISSISSIPPI, }
Harrison County. }

A regular term of the chancery court of Harrison county was begun on the first Monday of February, A. D. 1898, being the 7th day of February, A. D. 1898, at the court-house of said county, in Mississippi City, in said county and State, the same being the time and place designated by law for holding said court.

Were in attendance on said court, George P. Hewes, sheriff of said Harrison county, and F. S. Hewes, clerk of said court; the Hon. N. C. Hill, chancellor of the second chancery court, district of the State of Mississippi, being absent in obedience of the following order, to wit:

To F. S. Hewes:

Entirely unable to hold court; adjourn until Tuesday; have dockets ready.

N. C. HILL, *Chancellor.*

The court, having been duly opened by the said sheriff, was by him adjourned until Tuesday morning, 8 o'clock, February 8th, 1898.

TUESDAY MORNING, 8 O'CLOCK, *February 8th, A. D.* 1898.

The court met pursuant to adjournment.

Present: The Honorable N. C. Hill, chancellor of the second chancery court, judicial district of the State of Mississippi; George P. Hewes, sheriff of Harrison county, Mississippi, and F. S. Hewes, clerk of said court.

Bill of Complaint.

STATE OF MISSISSIPPI,
Harrison County.

Chancery Court, February Term, A. D. 1897.

GULF & SHIP ISLAND RAILROAD COMPANY, Complainant,
vs.
GEORGE P. HEWES, Tax Collector, Defendant.

To the chancery court of Harrison county:

The Gulf & Ship Island Railroad Company, a corporation of the State of Mississippi, duly incorporated on the 23rd day of February, 1882, under the laws of said State, by its solicitors, complains of George P. Hewes, tax collector of Harrison county, Mississippi, and complainant shows to the court the following facts:

1. That the legislature of the State of Mississippi, by an
3 act approved February 23rd, 1882, duly incorporated the Gulf & Ship Island Railroad Company as a corporation of said State, for the purpose of building and operating a railroad in and through said State, and by the said charter of incorporation, which is to be found on pages 849 to 862, inclusive, of the laws of the State of Mississippi for the year 1882, vested the said Gulf & Ship Island Railroad Company with all the powers, rights, and immunities usual and necessary to the accomplishments of the objects of its said incorporation.

2. That by the 18th section of the said charter of incorporation it is provided as follows:

"Be it further enacted, That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which the State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads, and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act."

3. And complainant charges as a matter of law that by the terms of the said section 18 the property of complainant, including its line, road-bed, rolling stock, and its depots and lands necessary or convenient to the use, operation, management, equipment, or maintenance of the said railroad, are exempt from any and all taxation, both by the State, county, or by any municipality, up to the 23rd day of February, A. D. 1902.

4. And complainant further shows that immediately after the passage of the said act complainant's corporation entered upon the construction of the said railroad, and that complainant now has in operation a line of railroad running from Gulfport, in the county of Harrison, in said State, to Hattiesburg, in the county of Perry,

in said State, a distance of 70.22 miles, as well as a branch line running from Gulfport, in said county and State, to Handsboro, a distance of about four miles, which branch line was constructed by complainant during the month of November, A. D. 1896.

5. Complainant further shows that notwithstanding its exemption from taxation, as aforesaid, which exemption is in full force and has not been repealed, the railroad commission of the State of
4 Mississippi have, in violation of the rights of complainant, returned its said property for taxation and has forwarded to George P. Hewes, tax collector of Harrison county, Mississippi, the assessment of the valuation of the property of complainant, to wit, its line, road-bed, and depots, and that the said George P. Hewes has demanded of complainant the sum of two hundred and fifty dollars ($250) as a privilege tax, and the further sum of seventeen hundred and eighty and $\frac{95}{100}$ dollars ($1,780.95) as State and county taxes upon its said line, road-bed, and depots, the said sum being — per cent. levied for State and — per cent. for county purposes.

6. The said George P. Hewes has not only demanded of complainant the taxes aforesaid, but has notified complainant that unless the same are paid within the time prescribed by law he, as tax collector of Harrison county, will proceed to collect said amount by a distress and levy upon the property of complainant.

7. Complainant avers and charges that the said taxes are, for the reason aforesaid, illegally demanded of complainant, and that unless restrained by this honorable court the said tax collector will proceed, as he has threatened, to seize the property of complainant for the satisfaction thereof, thereby inflicting irreparable loss and injury upon complainant.

Wherefore, the premises considered, complainant prays that its bill of complaint may be received and filed; that process may issue as required by law to said George P. Hewes, tax collector, commanding him to appear and answer this bill at or before the next term of this honorable court; that a preliminary writ of injunction may issue restraining the said George P. Hewes from collecting the taxes aforesaid, and from seizing, destraining, or levying upon any of the property of complainant for the satisfaction thereof.

That upon final hearing that this court will decree that complainant is exempt from taxation on its property as above described until the 23rd day of February, A. D. 1902, and that the said injunction issued against said tax collector may be perpetuated, and the said tax collector perpetually enjoined from demanding or collecting of complainant any taxes whatever on account of its line, road-bed, rolling stock, and depots, and all other property necessary or convenient to the use, operation, management, equipment,
5 or maintenance of said road until the year 1902, as aforesaid; and if mistaken in the relief prayed for, complainant prays for such other, further, and general relief as the equities of its case entitles it to receive, and complainant will ever pray.

E. J. BOWERS,
D. B. CHAFFE,
Solicitors for Complainant.

STATE OF MISSISSIPPI,
Harrison County.

Personally appeared before me, the undersigned authority in and for said county and State, S. S. Bullis, general manager of the Gulf & Ship Island Railroad Company, who, being by me first duly sworn, deposes and says that all the facts set forth in the foregoing bill are true.

S. S. BULLIS.

Sworn to and subscribed before me this 21st day of October, A. D. 1896.

W. S. CHAMPLIN,
J. P., District No. 2.

THE STATE OF MISSISSIPPI:

The clerk of the chancery court of Harrison county is hereby directed to issue the writ of injunction, as herein prayed for, on complainants entering into bond condition, as required by sec. 561, Annotated Code, in a penalty equal to double the amount of taxes sought to be collected, the said bond to be approved by the clerk.

Witness my hand the 28th day of Dec., 1896.

N. C. HILL,
Chancellor.

Filed Jan'y 1st, 1897.
F. S. HEWES, *Clerk.*

Injunction Bond.

THE STATE OF MISSISSIPPI,
County of Harrison.

We, the Gulf & Ship Island Railroad Company, as principal, and E. J. Bowers, S. S. Bullis, as sureties, bind ourselves to pay to George P. Hewes, tax collector of Harrison county, Mississippi, defendant, the sum of four thousand five hundred dollars unless the said principal obligor shall promptly pay the taxes enjoined and pay all damages and costs which may be awarded against or which the
6 said obligee may suffer or sustain by reason of the suing out by the said Gulf & Ship Island railroad of a writ of injunction and supersed-as in the cause of The Gulf & Ship Island Railroad *vs.* George P. Hewes, tax collector, &c., No. —, now pending in the chancery court of said county, enjoining and restraining the said defendant from levying or collecting against complainant any privilege or ad valorem taxes on its lines, road-bed, stock, depots, and lands necessary or convenient to the use, operation, management, equipment, or maintenance of the railroad of complainant until Feb'y 23rd, 1902, and especially from collecting the sum of two hundred and fifty dollars, privilege taxes, and the sum of $1,780.95, now demanded by defendant for taxes on its property above enumerated in case said injunction be dissolved.

Witness our signatures hereto this 30th day of December, 1896.

GULF & SHIP ISLAND RAILROAD COMPANY,
By S. S. BULLIS, *General Man'g'r.*
E. J. BOWERS.

THE STATE OF MISSISSIPPI, }
County of Harrison. }

Chancery Court, in Vacation.

Before me, F. S. Hewes, clerk of said court, this day came the sureties on the above bond, and, being by me duly sworn, deposed that over and above their just debts and liabilities and their contingent liabilities on all other bonds they were worth in visible property not exempt from execution or attachment by the laws of Mississippi as follows, to wit: the said E. J. Bowers the sum of $4,500.00.

Subscribed and sworn to before me this 9th day of January, 1897.

F. S. HEWES, *Clerk.*

I approve the above bond and sureties.

F. S. HEWES, *Clerk.*

Filed 11th day of Jan'y, 1897.

F. S. HEWES, *Clerk.*

7 *Writ of Injunction.*

The State of Mississippi to George P. Hewes, tax collector of Harrison county, Mississippi, defendant:

A bill for an injunction, as hereinafter set forth, having been duly filed, with the fiat of the Hon. N. C. Hill, chancellor of the 2nd chancery court, district of said State, thereon endorsed, and approved injunction bond having been given, you are hereby commanded and enjoined to desist from collecting from the complainant, The Gulf & Ship Island Railroad Company, the sum of two hundred and fifty dollars as a privilege tax, and the further sum of seventeen hundred and eighty and $\frac{95}{100}$ dollars as State and county taxes, upon said complainant's line of railroad, road-bed, and depots, and from seizing, destraining, or levying upon any of the property of the said complainant for the satisfaction thereof. You are further commanded to appear before the chancery court of the county of Harrison, in said State, at a term thereof, to be held at the court-house, in the town of Mississippi City, Mississippi, on the first Monday of February, A. D. 1897, then and there to answer the bill of complaint of the Gulf & Ship Island Railroad Company to which you are defendant.

Given under my hand and official seal, at Mississippi City, Miss., this the 11th day of January, A. D. 1897.

[SEAL.]

F. S. HEWES,
Chancery Clerk, Harrison Co., Miss.

To J. J. Herbert, justice of the peace of Harrison county, Miss., there being no coroner and good cause of exception as to the sheriff to serve and return.

Return.

I have this day executed the within writ personally by delivering to the within-named Geo. P. Hewes, tax collector of Harrison county, Miss., a true copy of this writ.

This the 11th day of Jan'y, 1897.

J. J. HERBERT,
J. P., Dis. # 2.

Returned and filed this the 11th day of January, 1897.

F. S. HEWES,
Chancery Clerk.

8 *Demurrer.*

Chancery Court, Feb. Term, 1897.

GULF & SHIP ISLAND RAILROAD COMPANY
vs.
GEO. P. HEWES, Tax Collector. } No. 861.

The defendant demurs to the bill of complaint filed against him in said cause and assigns the following causes of demurrer:

1st. Because there is no equity on the face of said bill.

2nd. Because said bill shows no cause in law or equity to prevent the collection of the taxes mentioned in said bill due by said complainant.

3rd. Because the exemption granted to complainant corporation in its charter, Acts 1882, sec. 18 thereof, was a mere act of bounty or immunity, and repealable at the pleasure of the legislature, and void of any element of contract, and having no force *forever*, or affording no protection from taxation of said corporation after its repeal by the legislature, and being in nowise a vested right.

4th. Because such exemption from taxation as is alleged and set forth in complainant's bill of complaint is not warranted, permitted, or protected by the laws of this State, the exemption mentioned in complainant's charter, Acts 1882, p. 861, sec. 18, having been repealed and annulled. Wherefore defendant prays the judgment of this hon. court if he shall make further answer to said bill of complaint.

GEO. P. HEWES,
Tax Collector,
By sol., W. G. EVANS, JR.

I hereby certify that, in my opinion, the foregoing demurrer is well taken and maintainable.

W. G. EVANS, JR., *Sol.*

Filed Feb'y 2nd, 1897.
F. S. HEWES, *Clerk.*

Refiled September 27th, 1897.
F. S. HEWES, *Clerk.*

9 *Order to Set Down.*

GULF & SHIP ISLAND RAILROAD COMPANY
vs.
GEO. P. HEWES, Tax Collector. } No. 861.

The clerk will please set this cause down on demurrer to bill of complaint.

W. G. EVANS, JR., *Sol.*

Filed Feb'y 2nd, 1897.
F. S. HEWES, *Clerk.*

Order.

GULF & SHIP ISLAND RAILROAD COMPANY
vs.
GEO. P. HEWES, Tax Collector. } No. 861.

This cause having been submitted to the court at this term of the court on bill of complaint and demurrer thereto interposed on part of defendant, the court having taken same under advisement—

It is ordered adjudged, and decreed that a decree in said cause shall be rendered in vacation and said complainant or defendant shall have the right of appeal, as though such decree had been rendered at this term.

Ordered, adjudged, and decreed this 26th day of February, 1897.

N. C. HILL,
Chancellor.

Filed Feb'y 26th, '97.
F. S. HEWES, *Clerk.*

Claim for Attorneys' Fees.

GULF & SHIP ISLAND RAILROAD COMPANY
vs.
GEORGE P. HEWES, Tax Collector.

The complainant in said cause will take notice that in case of the dissolution of the injunction in this cause that defendant will claim and offer to prove a reasonable solicitor's fee for defending said cause in the chancery court of Harrison county.

W. G. EVANS, JR.,
Sol. for Defendant.

Filed Jan'y 20th, 1897.
F. S. HEWES, *Clerk.*

10 *Decree.*

STATE OF MISSISSIPPI, *Harrison County.*

Chancery Court.

GULF & SHIP ISLAND RAILROAD COMPANY *vs.* GEO. P. HEWES, Sheriff. } No. 861.

This cause having at the Feb'y term, 1897, been submitted on defendant's demurrer to complainant's bill, and the same having been taken under advisement by the court, and the chancellor, having become satisfied therein, doth order, adjudge, and decree that said demurrer be, and is hereby, sustained. The complainant having so requested, it is ordered that twenty days be allowed complainant from this date in which to file amended bill in this cause.

It is ordered that the clerk enter this decree on the minutes of said court in vacation.

Ordered, adjudged, and decreed in vacation at Biloxi, Miss., the 13th day of Sept., 1897.

N. C. HILL, *Chancellor.*

Filed Sept. 16th, 1897.
F. S. HEWES, *Clerk.*

Amendment to Bill of Complaint.

STATE OF MISSISSIPPI, *Harrison County.*

Chancery Court, in Vacation.

GULF & SHIP ISLAND RAILROAD CO., Complainant, *vs.* GEO. P. HEWES, Tax Collector, Defendant.

Now comes complainant, and by leave of the court *just* had and obtained and without prejudice to the injunction hereinbefore granted amends its bill of complaint by inserting at the conclusion of the fourth paragraph thereof, on the second page thereof,
11 and after the words "November, A. D. 1896," the following:

Complainant further says and charges that the charter aforesaid and the exemption from taxation aforesaid was and constituted a contract between the incorporators and stockholders of complainant corporation and the State of Mississippi; that the State of Mississippi would not demand from complainant any taxes whatever upon its capital, its stock, its railroads and appurtenances, and upon any of its property in this State necessary or incident to the full exercise of the powers of such charter granted for the term of 20 years from the enactment of said charter, to wit, the twenty-third day of February, 1882, and that the incorporators and stockholders of complainant and the complainant, acting under the faith

of the said contract of exemption and being thereto moved and induced by reason of the said contract of exemption, entered upon the construction of the road aforesaid and the branches and side tracks aforesaid and completed the same at a cost of about one million dollars, with the full faith and belief that said contract of exemption contained in complainant's charter would be respected and observed by the said State, and that but for the said contract of exemption and the faith and belief of complainant, its incorporators and stockholders, in the good faith of the State in maintaining and observing its said contract, said railroad, branches, side tracks, etc., would never have been built.

And complainant further says that while it is contended by the said tax collector and, as complainant is advised and believes, by the board of supervisors of Harrison county, Mississippi, that the said exemption from taxation has been repealed by the provisions of the Annotated Code of 1892, which said contention complainant now avers is utterly untrue, still complainant pleads and shows that it is not in the power of the State of Mississippi to repeal the said exemption from taxation for the reason that the same constitutes a contract upon which complainant, its stockholders and corporators, have acted, and upon the faith of which they have expended, prior to said alleged repeal, large sums of money in and about the construction of said railroad, its branches and side tracks, to wit, the sum of one million dollars

And complainant says that to permit the State to repeal its contract of exemption so entered into by it would be a violation of the 10th section of article one of the Constitution of the United
12 States of America; and complainant pleads the protection of the said section and article of the Constitution of the United States of America against any repeal of the said exemption and in support of its exemption aforesaid.

E. J. BOWERS,
General Counsel, G. & S. I. R. R.

STATE OF MISSISSIPPI, }
Jefferson County. }

Personally appeared before me, the undersigned, notary public in and for the aforesaid county and State, E. J. Bowers, solicitor for the Gulf & Ship Island Railroad Company, —, being first duly sworn, deposes and says that the facts stated in the foregoing amendment are true.

E. J. BOWERS.

Subscribed and sworn to before me this 24th day of September, 1897.

[SEAL.] FLOYD T. JABINE.

Commission expires end of next General Assembly.

Filed Sept. 27th, 1897.
F. S. HEWES, *Clerk.*
2—327

Bill of Exceptions.

GULF & SHIP ISLAND RAILROAD CO.
vs.
GEO. P. HEWES, Sheriff.

Be it remembered that this cause was taken under advisement by his honor the chancellor, N. C. Hill, and that on the 13th day of September a decree was rendered in vacation sustaining the demurrer of defendant to the bill of complaint.

(See pages 10 and 11 of this transcript.)

Whereupon complainant, by its sol., obtained leave from the chancellor to amend its bill of complaint, which amendment was filed on 26th day of September, 1897.

(See pages 11, 12, 13, and 14 of this transcript.)

To which action of the chancellor in vacation in granting leave to complainant to amend its bill the defendant then and there excepted and now excepts, and prays that his bill of exceptions may be signed; which is accordingly done on the 29th day of September, 1897.

N. C. HILL, *Chancellor.*

Filed Oct. 2nd, 1897.
F. S. HEWES, *Clerk.*

13 *Agreement.*

STATE OF MISSISSIPPI,
Harrison County.

Chancery Court, Harrison County.

GULF & SHIP ISLAND R. R. CO.
vs.
GEORGE P. HEWES.

In this cause it is agreed that the demurrer originally filed to the original bill shall be considered as refiled to the original bill as amended, and that the said bill of complaint and objection shall be submitted for hearing in vacation to the chancellor, who shall render a decree therein in vacation as if in term time.

That in case the said demurrer should be sustained and the bill dismissed, the chancellor in his decree shall fix the amount of a bond for appeal, with supersed-as, to the supreme court of the State of Mississippi, which appeal may be perfected by the complainant as provided by law.

Witness our signatures this 31st day of December, A. D. 1897.

E. J. BOWERS,
Sol. for Complainant.
W. G. EVANS, JR.,
Sol. for Defendant.

Filed Jan'y 10th, 1898.
F. S. HEWES, *Clerk.*

Decree.

THE STATE OF MISSISSIPPI, }
Harrison County. }

Chancery Court.

GULF & SHIP ISLAND RAILROAD CO. }
vs. } No. 861.
GEO. P. HEWES, Sheriff. }

This cause having by agreement of counsel been submitted in vacation on amended bill of complaint and demurrer filed thereto, and the same having been taken under advisement by the chancellor, *and*, after considering same, doth order, adjudge, and decree that said demurrer be, and is hereby, sustained to said amended bill of complaint and said bill of complaint dismissed and complainant granted an appeal to the supreme court of said State, with supersed-as, upon complainant entering into bond conditioned, as provided by law, in the sum of one thousand dollars, said bond to be approved by the clerk of this court, and that complainant pay the costs of this suit.

Ordered, adjudged, and decreed this 10th day of February, A. D. 1898.

N. C. HILL, *Chancellor.*

Filed Feb'y 10th, 1898.
F. S. HEWES, *Clerk.*

14 THE STATE OF MISSISSIPPI, }
Harrison County. }

I, F. S. Hewes, clerk of the chancery court of said county and State, hereby certify that the foregoing 16 pages contain a true, correct, and complete transcript of all the pleadings, evidence, bills of exceptions, and decree appealed from in the case of The Gulf & Ship Island Railroad Company *v.* George P. Hewes, tax collector, No. 861, of said court, as the same remains on file and of record in my office.

Given under my hand and seal of said court, at office, in Mississippi City, this 2nd day of March, A. D. 1898.

F. S. HEWES, *Clerk.* [SEAL.]

Statement of Fee for Transcript.

Fee for transcript, taking bond, copy of bond, summons, and binding fee, $4.70, which has not been paid.

F. S. HEWES, *Clerk.*

STATE OF MISSISSIPPI, }
Harrison County. }

Know all men by these presents that we, Gulf & Ship Island Railroad Company, principal, and E. J. Bowers and E. Sugden,

sureties, are held and firmly bound unto Geo. P. Hewes, tax collector, in the sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands and delivered this the 23rd day of February, A. D. 1898.

The condition of this obligation is that whereas a final decree was rendered by the chancery court of Harrison county, in said State, on the 10th day of February, A. D. 1898, at the February term, A. D. 1898, thereof, in the case in said court styled "No. 861, G. & S. I. R. R. Co. *v.* Geo. P. Hewes, tax collector," adjudging that complainant's bill be dismissed:

Now, if said Gulf & Ship Island Railroad Company, principal obligor herein and appellant, will satisfy the said decree and also such final judgment as may be made in said cause and all costs if the said decree of said chancery court be affirmed by the supreme court of the State of Mississippi, to which court an appeal from said decree is to be prosecuted, then this obligation shall be void.

GULF & SHIP ISLAND RAILROAD COMPANY,
Per E. J. BOWERS,
E. SUGDEN.

The above bond is approved and filed this the 23rd day of February, 1898.

F. S. HEWES,
Chancery Clerk.

Endorsed: Filed Feb'y 23, 1898. F. S. Hewes, clerk.

15 THE STATE OF MISSISSIPPI, }
Harrison County. }

To the sheriff of said county, Greeting:

Whereas, on the 10th day of February, A. D. 1898, by a decree of our chancery court of the county of Harrison, in the aforesaid State, George P. Hewes, sheriff and tax collector of Harrison county, defendant, did recover judgment against the Gulf & Ship Island Railroad Company that the bill of complaint of said company in the case of The Gulf & Ship Island Railroad Co. *v.* Geo. P. Hewes, tax collector, No. 861, be dismissed, and that said company, complainant, pay the cost of suit, and the said complainant, The Gulf & Ship Island Railroad Company, having prayed and obtained an appeal to our supreme court, at Jackson, in said State, on the first Monday of March next, and having given bond for supersedeas:

We command you to cite the said Geo. P. Hewes, tax collector, or W. G. Evans, Jr., his attorney of record, to appear then and there, in and before said supreme court, to defend the said appeal, and have then and there this precept before our said supreme court.

Witness the Hon. Thos. H. Woods, chief justice of our said supreme court, the 2nd Monday of October, A. D. 1897.

Witness also F. S. Hewes, clerk of our said chancery court, and the seal of his court affixed the 23rd day of February, A. D. 1898.

F. S. HEWES, *Clerk.*

Endorsement: I hereby acknowledge service of the within writ and waive service of copy. This 23rd day of February, 1898. Geo. P. Hewes, sheriff & tax coll., Harrison county, Miss.

The foregoing record endorsed as follows:
No. 9018. Filed March 4th, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

16 In the Supreme Court, from Second District.

GULF & SHIP ISLAND R. R. COMPANY, Appellant,
vs.
GEO. P. HEWES, Tax Collector, Appellee. } No. —.

It is agreed between counsel for appellant and appellee that this cause shall be continued till the October term, A. D. 1898, of this court.

E. J. BOWERS,
For Appellant.
W. G. EVANS, JR.,
For Appellee.

Endorsed: Filed Ap'l 12, 1898. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on the 18th day of April, 1898, the following order was made:

GULF AND SHIP ISLAND RAILROAD CO.
v.
GEO. P. HEWES, Tax Coll., &c. } 9018.

Continued by agreement.

17 STATE OF MISSISSIPPI:

In the Supreme Court.

GULF & SHIP ISLAND R. R. Co., Appellant,
vs.
GEO. P. HEWES, Tax Collector, Appellee.

It is agreed between counsel for appellant and appellee that this case may be passed and continued until the March term, A. D. 1899, of the supreme court of the State of Mississippi.

E. J. BOWERS,
Sol. for Complainant & Appellant.
W. G. EVANS, JR.,
Solicitor for Defendant & Appellee.

Endorsed: Filed Jan'y 31, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on the 6th day of February, 1899, the following order was entered:

GULF & SHIP ISLAND R. R. CO.
v.
GEO. P. HEWES, Tax Coll., &c. } 9018.

Continued by agreement.

18 G. & S. I. RAILROAD CO., Appellant,
vs.
GEORGE P. HEWES, Appellee.

In this cause it is agreed th-t the case on appeal shall be heard and determined as if the bill stated and recited the fact that the said Gulf & Ship Island Railroad Company was chartered and constructed after the decision of the supreme court of the State of Mississippi in the case of The Mississippi Mills *vs.* Cook, 56 Miss., page 40, and that the incorporators and stockholders invested their money in the said enterprise relying upon the adjudication of the supreme court of Mississippi in said cause as the law, and that said investment would not have been made or said road built but for their reliance upon said adjudication, all of which is to be understood as incorporated in said bill by appropriate averments and pleading.

This agreement being made with the consent of the chancellor, whose judgment upon the demurrer would have been the same, and in order to save a motion to remand the cause in order to complete the bill by the introduction of such averment.

Witness our signatures this 11th day of April, A. D. 1899.

E. J. BOWERS,
For Def't & Appellant.
W. G. EVANS, JR.,
Sol. for Complainants & Appellees.

The above is entered into with my full assent.

N. C. HILL,
Chancellor.

Endorsed: Filed Ap'l 15, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

19 In the Supreme Court.

GULF & SHIP ISLAND RAILROAD COMPANY
vs.
GEORGE P. HEWES, Tax Collector.

Now comes appellant and assigns the following error to its prejudice appearing on the face of the record, viz:

The court erred in sustaining the demurrer and dismissing complainant's bill.

Respectfully submitted.

E. J. BOWERS,
Solicitor for Appellant.

Endorsed: Filed April 21, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

And on the 17th day of April, 1899, a day of the regular March term, A. D. 1899, the following order was made:

GULF AND SHIP ISLAND RAILROAD CO.
v.
GEO. P. HEWES, Tax Coll., &c. } 9018.

Submitted on brief by Mr. W. G. Evans, Jr., for the appellee, with leave to the appellant to file brief during the week.

And on the 8th day of May, 1899, the following final decree was rendered by the supreme court in said cause, to wit:

GULF AND SHIP ISLAND RAILROAD CO.
v.
GEO. P. HEWES, Tax Collector. } 9018.

This cause having been submitted on a former day of this term on the record herein from the chancery court of Harrison county, and this court, having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, adjudge, and decree that the decree of said chancery court rendered in this cause at the February term thereof, A. D. 1898, on the 10th day of February, 1898, be, and the same is hereby, affirmed, and that the appellant and E. J. Bowers and E. Sugden, sureties, do pay the costs of this cause in this court and in the court below, to be taxed, &c.

20 THE UNITED STATES OF AMERICA, *State of Mississippi.*

THE GULF & SHIP ISLAND RAILROAD Company, E. J. Bowers, and E. Sugden
vs.
GEORGE P. HEWES, Tax Collector. } Petition for Writ of Error.

To the Honorable Thomas H. Woods, chief justice of the supreme court of the State of Mississippi:

The petition of the Gulf & Ship Island Railroad Company and E. J. Bowers and E. Sugden respectfully shows—

That on the eighth day of May, A. D. 1899, the said supreme court rendered a judgment against the petitioners in a certain cause wherein your petitioner The Gulf & Ship Island Railroad Company was the appellant and the other petitioners were its sureties on its appeal bond and George P. Hewes, tax collector of the county of Harrison, in said State of Mississippi, was appellee, a judgment was rendered affirming the decree of the chancery court of said Harrison county, whereby the demurrer of said Hewes, tax collector, to the bill of complaint of said railroad company was sustained and

said bill was dismissed, and rendering judgment against said Gulf & Ship Island Railroad Company and said E. J. Bowers and E. Sugden for the costs of said cause in said supreme court and said chancery court; that in said suit was drawn in question the validity of certain statutes of the said State of Mississippi, on the ground of their being repugnant to the Constitution of the United States and the amendments thereto, and the decision of said supreme court was in favor of the validity of such statutes, and that in said suit was also drawn in question the validity of an authority exercised by the said tax collector of Harrison county under the said statutes of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of the said supreme court was in favor of the validity of such authority, and that in said suit was also drawn in question the validity of an authority exercised by the railroad commission of said State, acting as assessors of railroad property for taxation under the statutes of said State, on the ground that the same
21 is repugnant to the Constitution of the United States and the amendments thereto, and the decision of the said supreme court was in favor of the validity of such authority, and that in said suit was also drawn in question the validity of an authority exercised by the said supreme court and the chancery court of Harrison county, in said State, under the statutes of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of the supreme court was in favor of such authority; and the decision of the said supreme court of the State of Mississippi was final, and the said supreme court is the highest court of resort in said State.

Wherefore and whereby petitioners are aggrieved, and they pray for a writ of error, with citation and supersedeas, returnable into the Supreme Court of the United States on the —.

And, as in duty bound, they will ever pray, etc.

GULF & SHIP ISLAND RAILROAD COMPANY,
By E. J. BOWERS &
McWILLIE & THOMPSON, *Att'ys.*
E. J. BOWERS,
By McWILLIE & THOMSON,
His Att'ys.
E. SUGDEN,
By McWILLIE & THOMPSON,
His Att'ys.

McWILLIE & THOMPSON &
E. J. BOWERS,
Sol'rs for Petitioners.

STATE OF MISSISSIPPI:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition and in the assignment of errors by which it is accompanied,

it is ordered that a writ of error be, and the same is hereby, allowed to the said court, and that the same be made a supersedeas, the bond in the penal sum of four thousand dollars, also herewith presented, being hereby approved.

In testimony whereof witness my hand this — day of May, A. D. 1899.

THOMAS H. WOODS,
Chief Justice of the Supreme Court of the State of Mississippi.

Endorsed: Filed May 16, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

22 STATE OF MISSISSIPPI:

In the Supreme Court, March Term, 1899.

GULF & SHIP ISLAND RAILROAD COMPANY, Appellant,
vs.
GEORGE P. HEWES, Tax Collector of Harrison County, Appellee.

I, Thomas H. Woods, chief justice of the supreme court of the State of Mississippi at the present time, and upon the argument and hearing of the above-entitled appeal, do hereby certify:

I. That upon said argument and hearing the validity of legislation of said State of Mississippi subsequent to the statute thereof of February 23, 1882, was drawn in question by the Gulf & Ship Island Railroad Company on the ground of such legislation being repugnant to section 10 of article 1 of the Constitution of the United States, in that such legislation impaired the obligation of a contract between the State of Mississippi and said Gulf & Ship Island Railroad Company, and that the decision of said supreme court of Mississippi was in favor of the validity of such legislation and such constitutional provision.

II. That upon said argument and hearing the validity of the statutes of Mississippi in the Annotated Code of 1892, providing for the taxation of railroads, *were* drawn in question by the said Gulf & Ship Island Railroad Company on the ground of their being repugnant to the Constitution of the United States and the 14th amendment thereto, in that in and by said statutes the State of Mississippi denies to the said Gulf & Ship Island Railroad Company within its jurisdiction the equal protection of the laws, and that the decision of the said supreme court of Mississippi was in favor of the validity of the said statutes.

In witness whereof I have hereto subscribed my name this — day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

THOMAS H. WOODS,
Chief Justice of the Supreme Court of Mississippi.

23 I, E. W. Brown, clerk of the supreme court of Mississippi, do hereby certify that the Honorable Thomas H. Woods, by whom the foregoing certificate was made and given, was at the time

of making and giving the same and is now chief justice of the supreme court of Mississippi, to whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature subscribed thereto is genuine.

In witness whereof I have hereto set my hand and affixed the seal of the supreme court of Mississippi this the 16th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

E. W. BROWN, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Endorsed: Filed May 16, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

24 Know all men by these presents that we, the Gulf & Ship Island Railroad Company, E. J. Bowers, and E. Sugden, as principals, and Thomas A. McWillie and Robert H. Thompson, as sureties, are held and firmly bound unto George P. Hewes, tax collector of Harrison county, in the State of Mississippi, in the full and just sum of four thousand dollars, to be paid to the said George P. Hewes, tax collector, his successor in office, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the — day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a supreme court of the State of Mississippi, in a suit depending in said court between The Gulf & Ship Island Railroad Company, appellant, and George P. Hewes, tax collector of Harrison county, Mississippi, appellee, a judgment was rendered against the said Gulf & Ship Island Railroad Company and E. J. Bowers and E. Sugden, sureties on its appeal bond, and the said Gulf & Ship Island Railroad Company and the said Bowers and Sugden obtained a writ of error and filed a copy thereof in the clerk's office in the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George P. Hewes, tax collector, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Gulf & Ship Island Railroad Company, E. J. Bowers, and E. Sugden shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

[SEAL.] GULF & SHIP ISLAND RAILROAD COMPANY,
[SEAL.] By E. J. BOWERS & McWILLIE & THOMPSON, *Att'ys.*
[SEAL.] E. J. BOWERS,
By McWILLIE & THOMPSON, *Att'ys.*
[SEAL.] E. SUGDEN,
By McWILLIE & THOMPSON, *Att'ys.*

25 STATE OF MISSISSIPPI:

Personally appeared before me, the undersigned, chief justice of the supreme court of Mississippi, Thomas A. McWillie and Robert H. Thompson, who, being duly sworn, depose and say that they are severally worth the sum of two thousand dollars ($2,000) in visible property subject to execution over and above all their just debts and liabilities.

THOMAS A. McWILLIE. [SEAL.]
ROBERT H. THOMPSON. [SEAL.]

Sworn to and subscribed before me this 16 day of May, A. D. 1899.

THOMAS H. WOODS,
Chief Justice of the Supreme Court.

Endorsed: Filed May 16, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

26 I, E. W. Brown, clerk of the supreme court of Mississippi, do hereby certify that this and foregoing 25 pages contain a true, full, and perfect copy of the record and proceedings in the case of The Gulf & Ship Island Railroad Company, appellant, against George P. Hewes, tax collector, appellee, lately pending in said supreme court and numbered 9018 on the docket of said court, in which said cause no written opinion was delivered by said supreme court on affirming the decree of the chancery court of Harrison county, Mississippi.

In testimony whereof witness my hand and the seal of said supreme court of Mississippi this 27th day of May, A. D. 1899.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk.*

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit, between the Gulf & Ship Island Railroad Company and George P. Hewes, tax collector of Harrison county, in said State, and wherein judgment was rendered in favor of said defendant in said court on the eighth day of May, A. D. 1899, against said plaintiff in said court and against the Gulf & Ship Island Railroad Company and E. J. Bowers and E. Sugden, sureties, and in which suit was drawn in question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States and the amendments thereto, and the decision of the said supreme court was in favor of the validity thereof, and in which suit was also drawn in question the validity of an authority exer-

cised by the said Gulf & Ship Island Railroad Company under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of the said supreme court was in favor of the validity of such authority, and in which suit was also drawn in question the validity of an authority exercised by the railroad commission of said State acting as assessors of railroad property for taxation under the statutes and constitution of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the
28 decision of said supreme court was in favor of the validity of such authority, and in which suit was also drawn in question the validity of an authority exercised by said supreme court and by the chancery court of Harrison county, in said State, under the constitution and statutes of said State, on the ground that the same is repugnant to the Constitution of the United States and the amendments thereto, and the decision of the said supreme court was in favor of the validity of such authority, a manifest error hath happened, to the great damage of said Gulf & Ship Island Railroad Company and of said E. J. Bowers and E. Sugden, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 13th day of June next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16 day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal U. S. Circuit Court, Southern District of Mississippi, 5th Circuit.

Witness also my signature and the seal of the circuit court of the United States in and for the southern district of Mississippi this the day and year aforesaid.

L. B. MOSELEY, *Clerk*.

29 In obedience to the within writ of error I herewith return the same and send therewith to the Supreme Court of the United States, under my hand and the seal of the supreme court of Mississippi, directly and openly the record and proceedings in the cause in said writ mentioned, with all things concerning the same.

In testimony whereof witness my signature and the seal of said supreme court of Mississippi this 27th day of May, A. D. 1899.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk*,
By C. C. CAMPBELL, *D. C.*

29½ [Endorsed:] Filed May 16, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

30 UNITED STATES OF AMERICA, ss:

To George P. Hewes, tax collector of Harrison county, in the State of Mississippi, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the supreme court of the State of Mississippi, wherein The Gulf & Ship Island Railroad Company and E. J. Bowers and E. Sugden are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas H. Woods, chief justice of the supreme court of the State of Mississippi, this the 16 day of May, A. D. 1899.

THOMAS H. WOODS,
Chief Justice of the Supreme Court of Mississippi.

Executed the within process this day upon the within-named George P. Hewes in person by handing to him a true copy thereof, at Mississippi City, Mississippi, this May 18th, 1899.

FRED. W. COLLINS,
U. S. Marshal for the Southern District of Miss.,
By J. F. WILLIAMS,
Deputy Marshal.

[Endorsed:] Received May 16, 1899. Fred W. Collins, U. S. marshal. Filed May 23, 1899. E. W. Brown, clerk.

31 In the Supreme Court of the United States.

GULF & SHIP ISLAND RAILROAD COMPANY ET AL.
vs.
GEORGE P. HEWES, Tax Collector.

Assignment of Errors.

Afterwards, to wit, on the — day of May, in the year of our Lord eighteen hundred and ninety-nine, at the October term for eighteen hundred and ninety-eight of the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, come The Gulf & Ship Island Railroad Company and E. J. Bowers and E. Sugden, plaintiffs in error, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the final decree of the supreme court of Mississippi in said cause was in favor of the validity of legislation of said State subsequent to February 23, 1882, which legislation was drawn in question by said Gulf & Ship Island Railroad Company on the ground that such legislation was repugnant to section 10 of article 1 of the Constitution of the United States, in that the same impaired the obligation of a contract between said State and said railroad company contained in the charter of said company of the date aforesaid, as in fact it did.

II.

That the final decree of the supreme court of Mississippi in said cause was in favor of the validity of the statutes of said State in the Annotated Code of 1892, providing for the taxation of railroads, which statutes were drawn in question by the Gulf & Ship Island Railroad Company on the ground of their being repugnant
32 to the Constitution of the United States and the fourteenth amendment thereto, and that in and by the said statutes the State of Mississippi denies to said railroad company within its jurisdiction the equal protection of its laws, as in fact it does.

III.

That the final decree of the supreme court of Mississippi was in favor of the validity of an authority exercised by the chancery court of Harrison county, in said State, under the statutes thereof; which authority as exercised by said chancery court and by said supreme court in affirming said final decree was drawn in question on the ground that the same is repugnant to the Constitution of the United States and section 10 of article 1 thereof, in that the same impaired the obligation of a contract between said State and said railroad company contained in the charter of said company of the date aforesaid.

IV.

That the final decree of the supreme court of Mississippi was in favor of the validity of an authority exercised by said George P. Hewes, tax collector, defendant in error, under the statutes of Mississippi, which was drawn in question on the ground that the same is repugnant to the Constitution of the United States and the fourteenth amendment thereto, in that he is attempting to deprive said plaintiff in error of its property without due process of law.

Wherefore the said plaintiffs in error pray that the said final decree of the supreme court of Mississippi be reversed, etc.

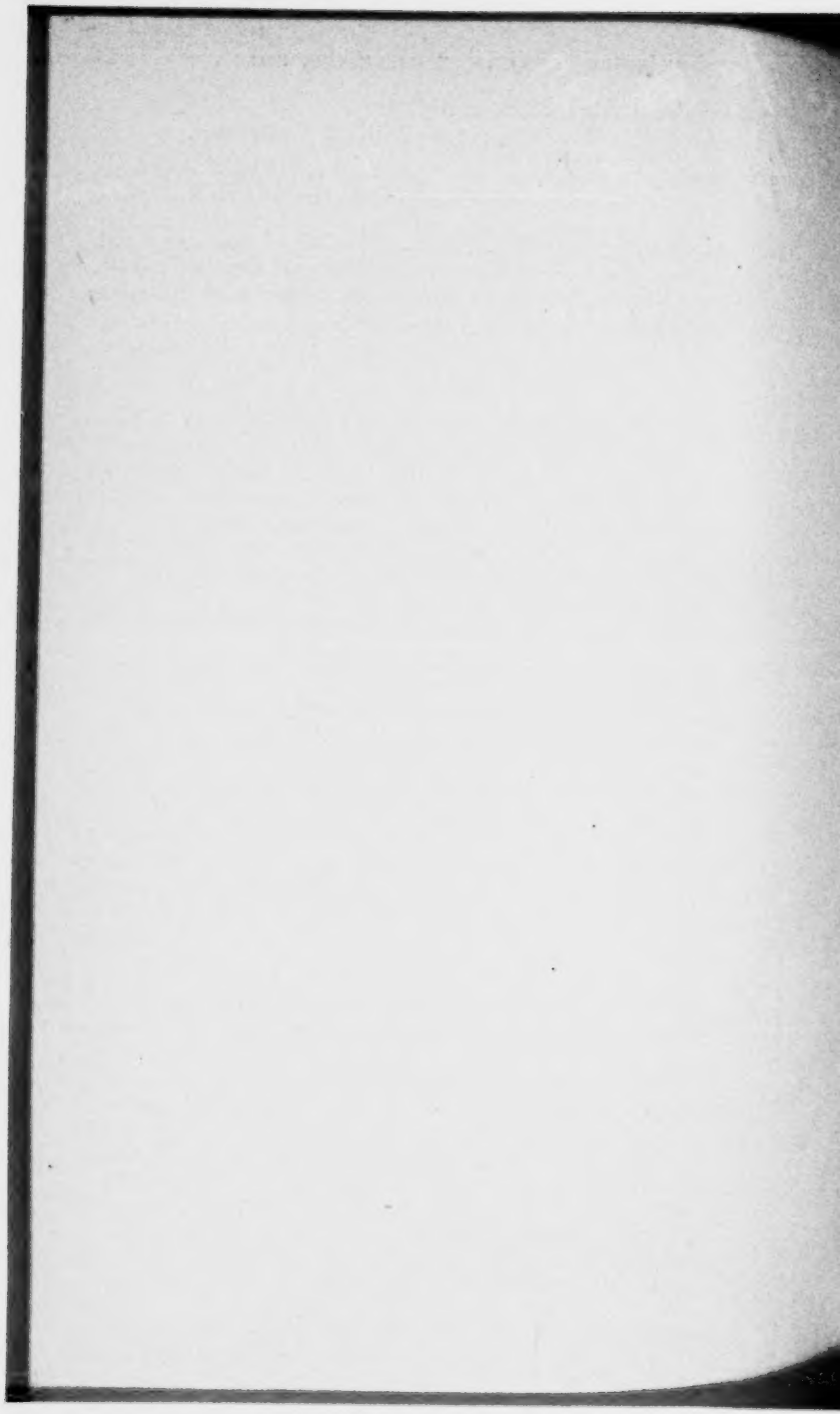
E. J. BOWERS AND
McWILLIE & THOMPSON,
Attorneys for Plaintiffs in Error.

[Endorsed:] Filed May 16, 1899. E. W. Brown, clerk, by C. C. Campbell, D. C.

Fees for making this transcript, $21.70.
Paid by G. & S. I. R. R. Co., per McWillie & Thompson.

E. W. BROWN, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Endorsed on cover: File No., 17,441. Mississippi supreme court. Term No., 327. The Gulf & Ship Island Railroad Company *et al.*, plaintiffs in error, *vs.* George P. Hewes, tax collector of Harrison county, Mississippi. Filed June 12th, 1899.



No. 81.

Br. of Bowers for P. C. on mo.

FILED
APR 11 1901
JAMES H. McKENNEY,
Clerk.

Filed April 11, 1901.

Supreme Court of the United States,

OCTOBER TERM 1900.

No. 81.

THE GULF & SHIP ISLAND RAILROAD COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

versus

GEO. P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

EATON J. BOWERS,
Solicitor for Plaintiff in Error.

"The Legal Printer," J. G. Hauser, 62 Camp St., N. O., La.

(17,441)

Supreme Court of the United States,

OCTOBER TERM 1900.

No. 81.

THE GULF & SHIP ISLAND RAILROAD COMPANY, ET ALS.,

PLAINTIFFS IN ERROR,

versus

GEO. P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

In Error to the Supreme Court of Mississippi.

This motion should be denied. It is an attempt on the part of defendant in error to evade a decision upon the merits of this case, *i. e.* the existence of the exemption claimed in the pleadings and the validity thereof.

The grounds of the motion are:—

1st. That no Federal question is raised or involved.

2nd. That no Federal question was raised at the proper time or in the appropriate way, and

3rd. That the Supreme Court of the State of Mississippi in the Mississippi Mills case held exemptions to be repealable, and that the pleadings in this case show that the railroad was built upon the faith of a reliance in the Mississippi Mills case.

The first two grounds are practically the same and may be discussed together.

We fail to understand the theory upon which the defendant in error contends that no Federal question is raised by the pleadings. By the amendment to the bill filed September 27th, 1897, and found on pages eight and nine of the transcript filed in this cause, it is stated:—

"Complainant further says and charges that the charter "aforesaid and the exemption from taxation aforesaid was "and constituted a contract between the incorporators and "stockholders of complainant corporation and the State of "Mississippi; that the State of Mississippi would not de- "mand from complainant any taxes whatever upon its capi- "tal, its stock, its railroads and appurtenances, and upon "any of its property in this State necessary or incident to the "full exercise of the powers of such charter granted for the "term of 20 years from the enactment of said charter, to-wit: "the twenty-third day of February, 1882, and that the in- "corporators and stockholders of complainant and the com- "plainant, acting under the faith of the said contract of ex- "emption and being thereto moved and induced by reason "of the said contract of exemption, entered upon the con- "struction of the road aforesaid and the branches and side "tracks aforesaid and completed the same at a cost of about "one million dollars with the full faith and belief that said "contract of exemption contained in complainant's charter "would be respected and observed by the said State, and "that but for the said contract of exemption and the faith "and belief of complainant, its incorporators and stockhold- "ers, in the good faith of the State in maintaining and ob- "serving its said contract, said railroad, branches, side "tracks, etc., would never have been built."

"And complainant further says that while it is contended "by the said tax collector and, as complainant is advised and

"believes, by the board of supervisors of Harrison county, "Mississippi, that the said exemption from taxation has been "repealed by the provisions of the Annotated Code of 1892, "which said contention complainant now avers is utterly un- "true, still complainant pleads and shows that it is not in "the power of the State of Mississippi to repeal the said ex- "emption from taxation for the reason that the same consti- "tutes a contract upon which complainant, its stockholders "and corporators have acted, and upon the faith of which "they have expended prior to said alleged repeal, large sums "of money in and about the construction of said railroad, "its branches and side tracks, to-wit, the sum of one million "dollars."

"And complainant says that to permit the State to repeal "its contract of exemption so entered into by it would be a "violation of the 10th section of Article One of the Consti- "tution of the United States of America; and complainant "pleads the protection of the said section and article of the "Constitution of the United States of America against any "repeal of the said exemption and in support of its exemp- "tion aforesaid."

From this it will be seen that the contract clause of the Constitution was expressly insisted upon and its protection invoked.

It may be said that the bill fails to set forth the particular statute or law which it is claimed violates the provision of the contract of exemption; in reply to this we say, that the pleading is as specific as it was possible at that time to make it. The demurrer was first sustained on the ground that the exemption was unconstitutional and that the general taxing law subjected the property of plaintiff in error, in common with all the other property in the State, to taxation. No particular act was cited or pointed out by the defendant in error as working its repeal. He averred in a general way the taxing law of the State an dthe Code of 1892, just as it is set forth in the amendment to the bill. But in addition to all this, we have here one of those cases in which the Federal question need not be specifically raised; indeed the decision of the court, adverse to the claim of exemption and contract, car-

ries with it, of necessity, the decision of the Federal question as to which no express averment in the pleadings is necessary.

In the case of Y. & M. V. R. R. vs. Wirt Adams, No. 35, October Term 1900, practically identical with this (except as to the consolidation feature upon which the cause was finally decided upon the merits) a motion similar to this was overruled, and in passing upon it Justice Brown aptly said:—

> " But upon the hearing of the case under consideration the " court (now differently constituted) overruled both of these " cases, and held, first, that the Legislature could not grant " an exemption to a railway company under the Constitu- " tion of 1869; second, that it could not grant an irrepealable " exemption under that Constitution; third, that a new com- " pany was formed by the consolidation of October 24, 1892, " and no exemption passed into it; fourth, that if the con- " solidation was a technical merger, still section 180 of the " Constitution of 1890 prevented any exemption from pass- " ing into it; fifth, that any such exemption was repealed by " the Acts of 1884, 1886 and 1890. Manifestly, that court " could not have held the railways liable for the taxes in suit " without deciding either that the provision of section 21 did " not constitute a legal contract in view of the Constitution " of 1869, or that no such contract existed in favor of the " plaintiffs in error in view of the consolidation, or that the " subsequent tax legislation of the State of 1892 and 1894 " did not impair the obligation of that contract. All those " were Federal questions, the vital one being whether the " Acts of 1892 and 1894 impaired the obilgation of the " contract, if any existed."
>
> " In short, the case is one of those frequently arising un- " der the second clause of R. S., Section 700, in which the " validity of a State statute under the Constitution of the " United States is necessarily drawn in question, and the " decision of the State court being in favor of its validity, " this court will take jurisdiction, though the Federal ques- " tion be not specially set up or claimed. As we have repeat- " edly had occasion to hold, it is only in cases arising under " the third clause of the section where a right, title, privilege " or immunity is claimed, that the Federal question must be

" specially set up. The cases are collected in Water Power " Company vs. Electric Street Railway Company (172 U. S. " 475, 488). Thus, in Wilson vs. Blackbird Creek Marsh " Co. (2 Pet. 245) the record did not show that the constitu- " tionality of an act of a State legislature was drawn in " question; but, said the Chief Justice, 'we think it impos- " sible to doubt that the constitutionality of an act was the " question and the only question, which could have been dis- " cussed in the State court.' So, in Satterlee vs. Matthew- " son (2 Pet. 380), it was said that if it sufficiently appear " from the record itself that the repugnancy of the statute " of a State to the Constitution of the United States was " drawn in question, this court has jurisdiction, though the " record does not in terms declare that this question was " raised. See also Crowell vs. Randell (10 Pet. 368); Fur- " man vs. Nichol (8 Wall. 44); Chicago Life Insurance Co. " vs. Needles (113 U. S. 574); Eureka Lake Co. vs. Yuba " County (116 U. S. 410); Kaukauna Co. vs. Green Bay " Canal (142 U. S. 254). And the fact that the Supreme " Court of the State did not expressly refer to the contract " clause of the Constitution does not prevent our taking jur- " isdiction, if the applicability of such clause were necessar- " ily inolved in its decision. As was said by Chief Justice " Waite in Chapman vs. Goodnow (123 U. S. 540, 548), 'If " a Federal question is fairly presented by the record, and " its decision is actually necessary to the determination of " the case, a judgment which rejects the claim, but avoids " all reference to it, is as much against the right, within the " meaning of section 709 of the Revised Statutes, as if it had " been specially referred to and the right directly refused.'

" The decision of the Supreme Court that the exemption " in the Mobile and Northwestern Railroad Company's char- " ter of 1870 was void under the Constitution of 1869, was " practically a decision that the contract of the State was " beyond the power of the Legislature and void, and hence " there was no contract to be impaired. But conceding this " contract to have been valid, another distinct question arose, " whether that contract enured to the benefit of the plaintiffs " in error by the successive consolidations—in other words, " whether, as to the plaintiffs in error, there was any con-

"tract ever existing which the taxing legislation of Missis-
"sippi could impair. Both these questions were ruled
"against the railroads; and while the contract clause of the
"Federal Constitution was not discussed, the case turned
"upon the existence of such a contract, and no question
"seems to have been made that, if there had been a contract,
"it was impaired by the taxing legislation of 1892. As we
"have often held, that where an impairment of a contract by
"State legislation is charged, the existence, or non-existence
"of the contract is a Federal question, it is impossible to es-
"cape the conclusion that the foundation of the whole case
"was, whether there was really a contract which had been
"impaired, and that this was necessary to the determination
"of the case. As already stated, this was a Federal ques-
"tion, and the fact that the Supreme Court did not in terms
"discuss the contract clause of the Constitution does not oust
"our jurisdiction.

"In view of the record and the opinions of the Supreme
"Court, the certificate of the Chief Justice, that the validity
"of the State statutes was actually drawn in question under
"the contract clause of the Constitution, was but a further
"assurance of a fact already appearing. The motion to dis-
"miss must, therefore, be denied."

It will be apparent from an inspection of these pleadings, together with the opinion of the court in Case No. 35 *supra*, and authorities in that case cited, that the Federal question was not only sufficiently raised, but that it inheres in the cause and decision, and that the result reached by the Supreme Court of Mississippi was impossible except upon the theory of a denial of the contract rights claimed by plaintiff in error.

Just what is meant by the suggestion that no Federal question was raised at the proper time, or in the appropriate way, we do not exactly understand. If it is intended to aver that it was incompetent to raise such a question by an amendment of the bill,

we reply by a citation to Section 542 of the Annotated Code of Mississippi, 1892, and the following decisions:

Richardson vs. Rolfe, 31 Miss. 616;
Ward vs. Whitfield, 64 Miss. 754;
Smith vs. Harrington, 49 Miss. 771;
Kimbrough vs. Curtis, 50 Miss. 117;
Hanserd vs. Gray, 46 Miss. 75;
Jeffries vs. Jeffries, 66 Miss. 216;

from which it is clear that it is the practice in Mississippi to allow amendments liberally at any stage of the proceedings, and that amendments incorporated in the bill at any time have the same effect as if they had been originally written therein; besides, by the order sustaining the first demurrer, signed September 13th, 1897, filed September 16th, 1897, complainant is expressly given leave to amend his bill and it must be apparent that this leave was given for the express purpose of permitting the insertion of the allegation raising the Federal question.

If it was intended, as we infer from page seven of appellee's brief, to urge that the Federal question was ignored or waived because it was not expressly assigned as error in the Supreme Court of Mississippi, we reply that the settled practice in Mississippi in chancery cases is to assign but one error, *i. e.* that the court erred in the rendition of the decree below, and under this assignment every question is raised. This is especially true where a case stands on bill and demurrer, because but one error was committed, the error or sustaining the demurrer and dismissing the bill.

A resort to the brief filed in that court will demonstrate beyond cavil that the Federal questions were fully discussed, and the same fact appears from the certificate of the Chief Justice of the State of Mississippi, who certifies as follows:—

"I. Thomas H. Woods, Chief Justice of the Supreme "Court of the State of Mississippi at the present time, and "upon the argument and hearing of the above-entitled ap- "peal, do hereby certify:

"I. That upon said argument and hearing the validity "of legislation of said State of Mississippi subsequent to the "statute thereof of February 23, 1882, was drawn in ques- "tion by the Gulf & Ship Island Railroad Company on the "ground of such legislation being repugnant to Section 10 of "Article 1 of the Constitution of the United States, in that "such legislation impaired the obligation of a contract be- "tween the State of Mississippi and said Gulf & Ship Is- "land Railroad Company, and that the decision of said Su- "preme Court of Mississippi was in favor of the validity of "such legislation and such constitutional provision.

"II. That upon said argument and hearing the validity "of the statutes of Mississippi in the Annotated Code of "1892, providing for the taxation of railroads *were* drawn "in question by the said Gulf & Ship Island Railroad Com- "pany on the ground of their being repugnant to the Con- "stitution of the United States and the 14th amendment "thereto, in that in and by said statutes the State of Missis- "sippi denies to the said Gulf & Ship Island Railroad Com- "pany within its jurisdiction the equal protection of the "laws, and that the decision of the said Supreme Court of "Mississippi was in favor of the validity of the said statutes.

"In witness whereof I have hereunto subscribed my name "this day of May, in the year of our Lord one thousand "eight hundred and ninety-nine.

"THOMAS H. WOODS,
"Chief Justice of the Supreme Court of Mississippi."

The fact that the bill charged that the railroad was constructed on the faith of the Mississippi Mills case does not deprive plaintiff in error of the benefit of the Federal question thus distinctly raised. The bill is to be considered as a whole so that each allegation must mean something; the contract of exemption was clearly set forth and by the first amendment, the right of the State to abrogate it was expressly challenged and the protection of the Federal Constitution specifically invoked. Nothing in the stipulation filed after the cause had reached the Supreme Court destroyed the force of this pleading. It must be apparent that it was the intention of the parties to stipulate that the complainant

was to have such benefit as might accrue to it from the proposition that it had constructed its road, relying on the faith of the decision in the Mississippi Mills case *as to the original constitutionality of such exemption.* No other construction is consonant with reason and no other will permit the whole bill to stand.

Besides, it is apparent that the Supreme Court of the State of Mississippi has decided the Federal question raised in this case adversely to plaintiff in error. Inasmuch as no written opinion was rendered or filed in the case this court is remitted entirely to the certificate of the Chief Justice as to what was tried and decided and that certificate emphatically and unequivocally states that the Federal questions were raised and decided adversely to plaintiff in error.

The pleadings in this case show that the question was properly presented, was germane, and should have been determined; and the certificate of the Chief Justice shows that it actually was determined adversely to plaintiff in error.

On that state of case this court in Armstrong vs. Athens County, 16th Peters, page 286, said:—

> " In the case now before us the presiding judge of the Su-
> " preme Court of Ohio has certified on the record that the
> " validity of a statute of the State was drawn in question,
> " on the ground that it was repugnant to the Constitution of
> " the United States, and that the decision was in favor of the
> " validity of said statute: and this certificate of the judge is
> " certified by the clerk, as a part of the record. We pre-
> " sume that the certificate of the presiding judge was made
> " by the authority of the court; and as this bill and answer
> " show that such a point might have arisen, and this certifi-
> " cate on the record states that it did arise, and was decided,
> " the case comes within the fourth clause above mentioned,
> " and this court must take jurisdiction, and examine whether
> " the point so certified was rightfully decided."

In the late case of C. B. & Q. Railroad Co. vs. Chicago, 166 U. S. p. 226, Justice Harlan in overruling the motion to dismiss, used the following language:—

"Now the right in question was distinctly asserted by the "defendant in its written motion to set aside the verdict and "grant a new trial. Among the grounds for a new trial "were the following: That the several rulings of the court in "excluding proper evidence, the statute under which the "proceedings for condemnation were instituted, and the ver- "dict of the jury and the judgment based upon it, were all "contrary to the 14th amendment declaring that no State "shall deprive any person of life, liberty or property with- "out due process of law, nor deny to any person within its "limits the equal protection of the laws."

"When the trial court overruled the motion for a new "trial and entered judgment it necessarily held adversely to "the claims of the Federal right."

* * * * * * *

"It is true that the Supreme Court of Illinois did not in "its opinion expressly refer to the Constitution of the United "States. But that circumstance is not conclusive against "the jurisdiction of this court to re-examine the final judg- "ment of the State court. The judgment of affirmance "necessarily denied the Federal rights thus specially set up "by the defendant; for that judgment could not have been "rendered without deciding adversely to such claims of "right. Those claims went to the foundation of the whole "proceeding so far as it related to the railroad company, and "the legal effect of the judgment of the Supreme Court of "the State was to deny them."

In C. B. & Q. Railroad Co. vs. Nebraska, 170 U. S., at page 66, Mr. Justice Shiras said:—

"This subject has been so frequently and so recently dis- "cussed by this court that it is unnecessary for us to further "consider it at large. It is sufficient to say that this record "discloses that the plaintiff in error, in its answer to the "writ of *mandamus* issued out of the District Court of "Douglass county, State of Nebraska, claimed that by rea- "son of certain provisions of its charter, of general laws of "the State, and of the ordinances of the city of Omaha, all "of which were specifically set forth, a contract was created "between the plaintiff in error and said city in respect to the

"viaduct in question, the obligations whereof would be vio-
"lated by the proposed enforcement of the subsequent Act
"of 1887, contrary to the provisions of the Constitution of
"the United States; that the District Court held that the
"laws and ordinances so pleaded did not create a contract
"between the State and city on the one side and the plaintiff
"in error on the other; that the plaintiff in error in its pe-
"tition in error to the Supreme Court of the State, specific-
"ally assigned as error the holding of the lower court, that
"the said laws, charter, and ordinances did not constitute a
"contract within the meaning and protection of the Consti-
"tution of the United States, guaranteeing the inviolability
"of contracts; and that the Supreme Court of the State, in
"its opinion disposing of the case states that 'the most im-
"portant subject of inquiry presented by respondent's con-
"tention that the ordinances under which the city proceeded
"in ordering the repairs in question contemplates the taking
"of its property without due process of law within the mean-
"ing of the State and Federal Constitutions, and also im-
"pairs the obligation of the contract under which its track
"was laid and under which said viaduct was constructed.'

"We think it is plain, from this recital, that a Federal
"question was specifically presented in both the trial and
"Supreme Court of the State.

"As the record further discloses that the State Supreme
"Court overruled the railroad company's contention that it
"held an existing contract whose obligation would be vio-
"lated by the enforcement of the provisions of a subsequent
"law of the State, it becomes the duty of this court to inquire
"whether there was error in that judgment of the Supreme
"Court of the State."

On the Merits.

Notwithstanding the fact that exemptions such as appear in the charter under consideration were repeatedly granted by a long line of legislative acts, beginning with the adoption of the Constitution of 1869 and running up to its repeal by the Constitution of 1890, all of which have been upheld by a uniform course of

decisions in the courts, by unvarying recognition by the executive department, and by numberless refusals on the part of the Legislature to repeal its grants, they are at this late day challenged in the opinion of the Supreme Court of Mississippi in the case of Adams vs. Mississippi Mills, 77 Mississippi, 194, and that gratuitously, when the question of the validity of these exemptions was not raised in the pleadings or urged in the argument.

One of the many old cases in which this question was involved found its way to this court, and your Honors will recall that in Yazoo Railroad Company vs. Thomas, 132 U. S. 174-184, Chief Justice Fuller, commenting upon this fact, said:—

> "The Supreme Court of Mississippi did not put its de-
> "cision upon the ground that it was not competent under the
> "State Constitution for the State to contract with the com-
> "pany that the latter should not be subjected to taxation."

All these contracts for exemption, upon the faith of which millions have been invested in Mississippi, are now to be torn up by the roots, and the State is to impair the obligation which it assumed and repudiate the contract which was made with investors. Surely there never was an instance presented to the court in which the protection of the contract clause of the Federal Constitution should more clearly apply—never a case which came more completely within the very evil contemplated by the framers of the Constitution—never a case in which the plighted public faith has been more grossly broken and solemn obligation more indefensibly violated. That such a controversy essentially involves a Federal question of the gravest kind must be self-evident.

No extended argument is deemed necessary here upon the nature and effect of this contract. A few suggestions are, however, submitted in order to satisfy the court that the points are serious and that the questions warrant full argument upon the merits and the most careful consideration.

As early as 1878, four years before the granting of the charter in suit, the Supreme Court of Mississippi in the case of Missis-

sippi Mills vs. Cook, 56 Miss. 40-52, construing the provisions of Section 13 of Article XII, of the Constitution of 1869, determined that this section did not of itself prohibit exemptions, but only declared the liability of corporations to taxation in the discretion or judgment, and subject to the control of the Legislature. This authoritative construction of the Constitution, subsequently reiterated in Railroad Company vs. Lambert, 70 Miss. 779 (*vide* 180 U. S. at p. 13), became as much a part of the Constitution of 1869 as the text itself (Douglass vs. County of Pike, 101 U. S. 677). And that this construction of the meaning of the Constitution of 1869 was not strained or unreasonable is shown by the legislation of Mississippi for many years prior to the adoption of that Constitution, from which it appears that the Legislature, when granting charters of incorporation, had often thought it necessary to provide that the corporations should be "subject to taxation," the terms of the provisions being either precisely like those adopted in the Constitution of 1869, or having the same effect in substance. The construction adopted in Mississippi Mills vs. Cook, therefore, involved no departure or change or new rule in regard to corporate taxation.

The power to exempt under that Constitution has been repeatedly adjudged in the courts of Mississippi in a series of cases beginning with Mississippi Mills vs. Cook, 56 Miss. 40 (1878).

The same view of the validity of these exemptions prevailed in the other departments of the State government. The executive officers of the State, including its law officers, uniformly, for fully twenty years, adopted the same construction and consistently acted upon it. In the judicial department the decision in Mississippi Mills vs. Cook, *supra,* was followed without break for twenty years, as will be seen by reference to the following cases involving, in one way or another, the question of the constitutionality of exemptions under the Constitution of 1869: McCullock *et al.* vs. Stone, 64 Miss. 378; Y. & M. V. R. R. Co. vs. Thomas *et al.*, 65 Miss. 378; Vicksburg Bank vs. Worrell, 67 Miss. 47; Attala County vs. Kelly, 68 Miss. 40; L. N. O. & T. Ry. Co. vs. Taylor,

68 Miss. 361; Railroad Co. vs. Lambert, 70 Miss. 779. And this is again strikingly reiterated in the recent opinion in the Tombigbee Mills case.

The journals of the Legislature of the State of Mississippi will show that at nearly every session of the Legislature for fifteen years prior to the institution of this suit, attempts were made to repeal the exemptions enjoyed by railroad companies from taxation, all of which were by decisive majorities defeated.

This writer has sat in three sessions of the Legislature since the institution of this suit, in each of which an attempt was made to repeal these exemptions, and in each case the bill proposing so to do was lost.

This long-continued practice of the legislative, executive and judicial departments ought to be most convincing as to the legality of these exemptions. No rule of interpretation is better settled in this court than that which gives the greatest weight to such practice and interpretation. In The Laura, 114 U. S. 411, 416, Mr. Justice Harlan, citing Stuart vs. Laird, 1 Cranch 299, 308, said:—

> "Touching the objection now raised as to the constitu-
> "tionality of the legislation in question, it is sufficient to say,
> "as was said in an early case, that the practice and acquies-
> "cence under it, 'commencing with the organization of the
> "judicial system, affords an irresistible answer, and has in-
> "deed fixed the construction.'"

And in Ogden vs. Saunders, 12 Wheat. 213, 290, Mr. Justice Washington said that the doctrine—

> "proceeds upon the presumption, that the contemporaries of
> "the Constitution have claims to our deference on the ques-
> "tion of right, because they had the best opportunities of
> "informing themselves of the understanding of the framers
> "of the Constitution, and of the sense put upon it by the
> "people when it was adopted by them."

In view of the fact that the investment by stockholders and creditors of the railroad company was clearly made in reliance

upon this established practice as to exemptions and of the authoritative interpretation of the highest court of the State affirming the constitutional power to exempt, the following language of Mr. Justice Swayne in Township of Pine Grove vs. Talcott, 19 Wall. 666, 667, is singularly applicable:—

> "When the bonds were issued, there had been no such
> "authoritative intimation from any quarter that such stat-
> "utes were invalid. The Legislature affirmed their validity
> "in every act by an implication equivalent in effort to an
> "express declaration. And during the period covered by
> "their enactment, neither of the other departments of the
> "government of the State lifted its voice against them. The
> "acquiescence was universal."

See also Brisco vs. The Bank of the Commonwealth of Kentucky, 11 Pet. 257, 318; Prigg vs. The Commonwealth of Pennsylvania, 16 Pet. 559, 619; Cooley vs. Board of Wardens of Port of Philadelphia *et al.*, 12 How. 299, 315; Aufmordt vs. Hodden, 137 U. S. 310, 32;9 Schell's Executors vs. Fauche, 108 U. S. 562, 672; Field vs. Clark, 143 U. S. 649, 691; McPherson vs. Blacker, 146 U. S. 127; Kennedy vs. Gies, 25 Mich. 83, 92. The Mississippi authorities are to the same effect. Daily vs. Swope, Guardian, Etc., 47 Miss. 367, 385; French vs. The State, 52 Chrisman vs. Brookhaven, 70 Miss. 477, 483.

As Simrall, J., said in Hawkins *et al.* vs. Carroll Co., 50 Miss. 735, 752 (1874):

> "At the time of the adoption of the Constitution, the
> "power of the Legislature to authorize municipal aid to
> "those enterprises, coupled with the delegated authority of
> "taxation, was well established, both by legislative prece-
> "dents and judicial decisions in this and the other States."

The defendant in error contends that the Supreme Court of the State of Mississippi has decided that the exemption contained in the charter of plaintiff in error has been repealed, and that this decision is merely the construction by the State court of its own local laws, raising no Federal question.

In other words, the position is that the decision of a State court, as to whether a contract is still in existence or has been waived, is conclusive on this court. This is not the rule. The question as to the existence of a contract as well as its true construction has been in all cases determined by this court independently of the decisions of the State court, and in some cases in direct opposition to the rulings of these tribunals. Ohio Life Insurance and Trust Company vs. Debolt, 16 How. 416, 432; Jefferson Bank vs. Shelly, 1 Blac. 436, 443; Bridge Proprietors vs. Hoboken Co., 1 Wall. 116, 145; Delmas vs. Insurance Company, 14 Wall. 661, 668; Railroad Companies vs. Gaines, 97 U. S. 697, 709; University vs. People, 99 U. S. 309, 321, 323; Wright vs. Nagle, 101 U. S. 791, 793; Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 344, 356; Memphis Gas Co. vs. Shelby County, 109 U. S. 398, 399; Vicksburg, Etc. Railroad Co. vs. Dennis, 109 U. S. 665, 667; Given vs. Wright, 117 U. S. 648, 655; N. O. Water Works vs. La. Sugar Co., 125 U. S. 18, 38; Yazoo Railroad Co. vs. Thomas, 132 U. S. 174, 184; McGahey vs. Virginia, 135 U. S. 662, 669; Wilmington & Weldon Railroad vs. Alsbrook, 146 U. S. 275, 293; Bryan vs. Board of Education, 151 U. S. 639, 649; Mobile & Ohio Railroad vs. Tennessee, 153 U. S. 486, 492; Shelby County vs. Union, Eetc., Bank, 161 U. S. 174, 185; Douglass vs. Kentucky, 168 U. S. 488, 502; McCullough vs. Virginia, 172 U. S. 102, 109; Water Power Co. vs. Street Railway Co., 172 U. S. 475, 487.

In a number of the foregoing cases motions were made to dismiss upon the ground that the construction by the State court of its own Constitution and laws was binding upon this court, but in every instance the motion to dismiss was denied. In Yazoo Railroad Co. vs. Thomas, 132 U. S. 174, 184, a motion to dismiss was made upon very much the same ground as that urged in the case at bar; and in overruling the motion Chief Justice Fuller said:—

> "The taxes in question were assessed under the Act of
> "1888, and if the charter of the company, which became a
> "law on the 17th of February, 1882, inhibited such taxa-

"tion, then this court has jurisdiction to re-examine the con-
"clusion reached. Although by the terms of the Act of
"1888 the taxes therein referred to were not to be levied as
"against a railroad exempt by law or charter, yet the Su-
"preme Court held that this company is not exempt, and is
"embraced within the Act; so that if a contract of exemption
"is contained in the company's charter, then the obligation
"of that contract is impaired by the Act of 1888, which
"must be considered, under the ruling of the Supreme
"Court, as intended to apply to the company. The result
"is the same, although the Act of 1888 be regarded as sim-
"ply putting in force revenue laws existing at the date of the
"company's charter, rather than itself imposing taxes, for
"if the contract existed those laws became imperative, and
"would be reinstated by the Act of 1888. The motion to
"dismiss the writ of error is therefore overruled."

In no class of cases has this court oftener exercised its power to determine for itself the existence of an alleged contract than in the long line of decisions involving so called exemptions or immunities from taxation.

Therefore, even if the State court had only decided that the rights acquired under section 18 had been lost by repeal and that a contract no longer existed, it would have clearly rendered a decision upon a Federal question, pure and simple.

In the following cases the court determined for itself whether or not there was still an existing contract or whether the rights acquired thereunder had been waived or in any manner lost or surrendered. Morgan vs. Louisiana, 93 U. S. 217-219; Railroad Co. vs. County of Hamblin, 102 U. S. 273, 275; Wilson vs. Gaines, 103 U. S. 417; Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 244, 256; Memphis Railroad Co. vs. Commissioner, 112 U. S. 609, 617; St. Louis, Etc., Railroad Co. vs. Berry, 113 U. S. 465, 472; Chesapeake & Ohio Railroad Co. vs. Miller, 114 U. S. 176; Given vs. Wright, 117 U. S. 648, 655; Keokuk & Western Railroad Co. vs. Missouri, 152 U. S. 301, 305; Mobile & Ohio R. R. Co. vs. Tennessee, 153 U. S. 486, 492;

St. L. and S. F. Railway vs. Gill, 156 U. S. 649, 656; N. & W. Railroad vs. Pendleton, 156 U. S. 667, 673; Mercantile Bank vs. Tennessee, 101 U. S. 161, 171.

It is interesting to note the statutes which have been construed into conflict with these chartered rights.

Section 2 of Chapter 22 of the Acts of 1884, pages 30 and 31, provides that certain railroads, naming them, (and it is significant that the Gulf & Ship Island is not among those named), should pay privilege taxes at rates therein stipulated, in lieu of all other taxes claimed of them. By that section every railroad in the State liable to taxation was enumerated, and no mention is made of the Gulf & Ship Island Railroad which had been chartered two years prior to that time. At the conclusion of the list of railroads liable to taxation the following was inserted: "*All railroads not named herein* AND NOT EXEMPT FROM TAXATION BY THEIR CHARTER, sixty dollars per mile." From this it must be apparent that it was the intention of the Legislature to lay down a rule for the taxation of every road in the State, and that all charters which, like that of the Gulf & Ship Island Railroad, contained an express exemption which had not expired were to be taken out of the operation of the act and relieved of taxation.

But it is insisted that exemptions theretofore existing, even though specially recognized by that Act were repealed by Section 6 of Chapter 1 of the Acts of 1886, page 23 thereof; that section is as follows:—

> "SEC. 6. *Be it further enacted,* That the Act entitled "'An Act to amend Sections 607 and 608 of the Code of "1880, in relation to privilege taxes on railroads, approved "March 13, 1884, be so amended as to fix the amount of "privilege tax *to be paid by the several railroad companies "mentioned and referred to in said Act at sums twenty-five "percentum greater respectively than the sums mentioned in "said Act;* and hereafter said railroad companies shall pay "privilege taxes respectively twenty-five *percentum* greater "per mile than as fixed in said Act.'" (Italics ours.)

But one construction can be placed on this statute, i. e. that it increased by twenty-five per cent. the rate of taxation on all roads which were taxed by the Act of 1884. It did not seek to subject any property which had been theretofore exempt, and its operation was expressly confined to the "several railroad companies mentioned and referred to in said Act"; manifestly meaning those that were referred to for purposes of taxation, and having no relation whatever to those that were excused because of their exemption.

The Act of 1890, page 13, which practically re-enacted the law of 1894, contains this provision, "*provided no railroad shall be subjected to taxation while exempt by its charter*", again recognizing and affirming any exemption that existed in the charter of any railroad company, absolving all such from taxation, and making the recitals of the charter the test as to the existence of the immunity.

Nor was the Code of 1892 designed to reach railroads enjoying exemptions, or repeal grants thereof.

Section 3379 is a part of the privilege license law of the State which is, the Court will observe, not a tax upon property, but a license upon an occupation or calling, and not within the purview of any of the grants of exemption. These privilege licenses have been a part of the law of the State of Mississippi since 1866, and have always been construed as being separate and apart from the regular taxation, being in the nature of a license for the privilege of doing business.

It has never been seriously contended by any of the railroads enjoying exemptions that they were not subject to this license charge for the right to do business.

Section 3774 provides generally the property which shall be exempt from taxation; that is, *the specific things that shall be exempt* without reference whatever to *persons or corporations who may have been exempted by charter, private act, or contract with the State.*

It is a law general in its character which does not apply to or repeal special statutes. *Generalia specialabus non derogant.*

This principle is expressly recognized in the Code, for by Section 8, Chapter 1 thereof, it is provided that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be *expressly* so provided herein."

Section 3875 repealed no exemption, because it provided a separate listing of exempt property in these words:—

> " and if any of said property is claimed to be exempt from
> " taxation, it shall be separately stated and the law cited
> " under which the claim is made".

Section 3877 constituting the Railroad Commission a Board of Assessors, evidently contemplated that there was exempt railroad property, because the said assessors were required to assess only the railroad property "liable to taxation in the State".

All of these provisions clearly show that the law-makers had before them the fact that certain property was exempt from taxation, and they will be utterly meaningless if they are treated as repealing all exemptions granted since the adoption of the Constitution of 1869, because there are no claims to exemptions in the State of Mississippi, as the court will observe by inspecting our statutes arising prior to 1869. The only one granted prior to that date, *i. e.* to the Mobile & Ohio Railroad Company was, by that corporation, expressly surrendered many years ago in settlement of a debt due the State.

It may be said that the complaint made is not of the invalidity of the subsequent statutes, but of the construction given by the court. Granting this to be true, the Federal question is still apparent. The application of any statute passed subsequent to the contract claimed so as to defeat or annul the contract, operates to deprive the party claiming thereunder of a right guaranteed him by the Federal Constitution and raises a Federal question.

It is immaterial whether the statute in express terms abrogates the contract, or the court by construing and applying the statute,

works out the same result; if it is passed after the making of the contract claimed, and is so interpreted or applied as to deprive the plaintiff in error of the benefit of the contract it is a violation of the Federal Constitution.

This was clearly stated in the case of the Bridge Proprietors vs. Hobokon L. & I. Co., 1st Wall., page 116. In that case Mr. Justice Miller said:—

"The true and rational rule is, that the court must be able "to see clearly, from the whole record, that a certain pro- "vision of the Constitution or Act of Congress was relied on "by the party who brings the writ of error, and that the "right thus claimed by him was denied."

"Looking at the record before us, and applying to it these "principles, we find no difficulty in the matter. The de- "fendants claim, under the Acts of 1860 of the New Jersey "Legislature, a right to build their railroad bridge or via- "duct, over the Hackensack river, inside the limits pro- "hibited by the Act of 1879. The plaintiffs say that to "permit this is to violate the contract which they have with "the State of New Jersey, and therefore the Act of 1860, "so far as it confers authority on the defendants, is made "void by the Constitution of the United States, because it "impairs the obligation of a contract. The State court dis- "missed the bill on those pleadings alone. It could not have "done this, without holding the Act of 1860 to be valid, as it "was the only authority on which defendants rested their "right to build any structure whatever across the Hacken- "sack river. In holding that Act to be valid, notwithstand- "ing plaintiff's claim that it was void as impairing the ob- "ligation of their contract with the State of New Jersey, a "decision was made within the very terms of the 25th sec- "tion of the Act of Congress of 1789."

"It is said, however, that it is not the validity of the Act "of 1860 which is complained of by plaintiffs, but the con- "struction placed upon that Act by the State court. If this "construction is one which violates the plaintiffs' contract "and is the one on which the defendants are acting, it is clear "that the plaintiffs have no relief except in this court, and

"that this court will not be discharging its duty to see that "no State Legislature shall pass a law impairing the obliga- "tion of a contract, unless it takes jurisdiction of such "cases."

Conclusion.

From the authorities above cited it must be apparent that there is absolutely no color to the motion to dismiss, and that being true the motion to affirm will not be considered. Nor can it be said that "it is manifest that the writ of error was taken for delay only, or that the question on which jurisdiction depends is so frivolous as not to need further argument." Rule 6, Section 5. Unless such is the case the motion to affirm will be denied.

We have purposely omitted any discussion at length of the merits of the case. If the motion warranted or called for any such, the argument which this court has recently heard in the other tax cases from the State of Mississippi sufficiently acquaint it with the issues involved.

Respectfully submitted,

EATON J. BOWERS,
Solicitor for Plaintiff in Error.

APPENDIX.

Giving Statutes Which It Is Claimed Subject the Gulf & Ship Island Railroad Company to Taxation.

Chapter 22, Page 29, Acts of 1884.

An Act to amend Sections 607 and 608 of Code of 1880, in relation to Privilege Tax on Railroads, and for other purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That section 607 of the Code of 1880 be amended so as to read as follows: Each and every railroad company which will accept this act, and annually pay to the Auditor of Public

Accounts the taxes hereinafter provided for, and will signify their acceptance in writing, shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; two-thirds of which said tax shall be placed to the credit of the counties through which said railroads may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties, *provided,* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property, and for all purposes, any exemption in their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries; *provided further* that the provisions of this act shall not have the effect to tax any of the lands of the Memphis and Vicksburg Railroad Company until the 1st day of February, 1886.

SEC. 2. *Be it further enacted,* That section 608 of the Code of 1880 be so amended as to read as follows: Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State Treasurer on the warrant of the Auditor, on or before the fifteenth day of December in each and every year, a privilege tax as follows, to-wit: The Mobile and Ohio Railroad Company and branches, one hundred dollars per mile, the Chicago, St. Louis and New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis and Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile and Texas Railroad Company, or the Louisville and Nashville Railroad Company, one hundred dollars per mile; the Mississippi and Tennessee Railroad Company, one hundred dollars per mile; the Alabama Central Railroad Company, one hundred dollars per mile; the Alabama Great Southern Railroad Company, one hundred dollars per mile; the Vicksburg and Meridian Railroad Company, eighty dollars per mile; the West Feliciana Railroad Company, thirty dollars per mile; the Grand Gulf and Port Gibson Railroad Company, thirty dollars per mile; the Mississippi Valley and Ship Island Railroad Company, forty dollars per mile; the Ship Island, Ripley and

Kentucky Railroad Company, twenty-five dollars per mile; the Mobile and Northwestern Railroad Company, twenty dollars per mile; the Greenville, Columbus and Birmingham Railroad Company, forty dollars per mile; the Natchez, Jackson and Columbus Railroad Company, forty dollars per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All the railroads not named herein and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempt from taxation by its charter.

SEC. 3. *Be it further enacted*, That section 604 of Code of 1880, be amended by striking out all in said section after the word "purchaser" in the twentieth line.

Approved March 12, 1884.

SECTION 5, CHAPTER 2, PAGE 23, ACTS OF 1886.

SEC. 6. *Be it further enacted*, That the Act entitled "An Act to amend Sections 607 and 608 of the Code of 1880, in relation to privilege taxes on railroads, approved March 13, 1884, be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said Act at sums twenty-five *per centum* greater respectively than the sums mentioned in said Act; and hereafter said railroad companies shall pay privilege taxes respectively twenty-five *per centum* greater per mile than as fixed in said Act.

SECTION 5, CHAPTER 2, ACTS OF 1890, PAGES 12 AND 13.

SEC. 5. That Section (1) of the Act of March 12, 1884, relating to railroad privilege taxes, be amended by striking out the last proviso thereof, and that the same be re-enacted as amended. That section two of said Act of March 12, 1884, be amended by striking out all after the word "to-wit", in line nine and inserting the following:—

The Alabama Great Southern, per mile.....$150 00
The Canton, Aberdeen and Nashville, per mile..... 100 00
The East Tennessee, Virginia and Georgia, per mile... 150 00

The Georgia Pacific, per mile	100 00
The Illinois central and branches, per mile	150 00
The Kansas City, Memphis and Birmingham, per mile	150 00
The Louisville and Nashville, or Mobile and New Orleans, per mile	150 00
The Louisville, New Orleans and Texas and branches, per mile	150 00
The Mississippi and Tennessee, per mile	150 00
The Mobile and Ohio and branches, per mile	150 00
The Memphis and Charleston, per mile	150 00
The Natchez, Jackson and Columbus, per mile	50 00
The Vicksburg and Meridian, or Alabama and Vicksburg, per mile	125 00
The West Feliciana, per mile	100 00
The Yazoo and Mississippi Valley, per mile	100 00
The New Orleans and Northeastern, per mile	150 00
The Gulf and Ship Island (Northern Division), or Gulf and Chicago, per mile	60 00
The Gulf and Ship Island (Southern Division), per mile	60 00
The Mobile and North-Western, per mile	150 00
And all other railroads constructed or to be constructed, per mile	100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed; and provided further, that if any railroad shall fail to pay the privilege tax required by law, and within the time provided by law, the same shall be assessed for taxation, and shall pay the *ad valorem* taxes levied for the year of such failure; and all the provisions of Sections two, three, four and five of the Act entitled "An Act to provide for the assessment and collection of past due and unpaid taxes on railroads which have escaped the payment thereof", approved April 3, 1888, shall apply in full force in all such cases; said Section two of said Act being amended by striking out the words "sixty days after the passage of this Act," in lines one and two, and by striking out the words "which said railroad has failed

to avail itself of the provisions of the first section of this Act and paid taxes according thereto," in lines three, four, five, six and seven, and also by striking out the word "next" after the words "June and July" in lines twenty-two and twenty-four, respectively, and said sections of said Act as amended are hereby re-enacted.

SEC. 6. This Act shall take effect on its passage.

Approved February 24th, 1890.

SECTION 3379, CHAPTER 108, ANNOTATED CODE OF 1892.

3379. *Railroads—*

Railroads are divided into four classes: First, second, third, and narrow-gauge, and privilege taxes are levied on them as follows:—

On each railroad of first class, per mile	$20 00
On the second class	15 00
On the third class	10 00
On narrow gauge class	2 00

The railroad commission shall, annually, on or before the first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on, or before the first day of December.

SECTION 3875, CHAPTER 116, PAGE 860, ANNOTATED CODE OF 1892.

3875. *Assessment and Taxation of Railroads: Each Company to File Schedule.*—Each railroad company owning and operating a railroad, shall, on or before the first Monday in April in each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches and side-tracks, and showing how many miles or fractions thereof lie in this State, and in each county of the State, and in each city, town or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value and the value of its franchise; the number of engines and their respective values; the gross amount of receipts in the year pre-

ceding; the number of cars of all kinds, their classes and value; the number of depot-buildings and warehouse and other buildings; in what county and city, town, village or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county, and city, town, village, or levee district located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company within the State, not enumerated, with its value; the number of bridges and ferries in this State, in what county, city, town, village, or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this State owned, describing the same, and giving the location and value thereof, the quantity of land used for depots and machine-shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this State; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

SECTION 3877, CHAPTER 116, PAGE 861, ANNOTATED CODE OF 1892.

SECTION 3877. *The Same: State Railroad Assessors.* The members of the railroad commission are constituted State railroad assessors, and they shall, upon the receipt or making and completion of the schedules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property *"liable to taxation in the State,"* affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this State; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this State.

SECTION 3744, CHAPTER 116, PAGE 830, ANNOTATED CODE OF 1892.

3744. *What Property Exempt.*—The following property, and no other, shall be exempt from taxation, to-wit:—

(a) All cemeteries used exclusively for burial purposes.

(b) All property, real or personal, belonging to the United States.

(c) All property, real or personal, belonging to this State, or to any county or municipal corporation thereof.

(d) All property, real or personal, belonging to any religious or charitable society, or incorporated institution for the education of youth, used exclusively for the purpose of such society or institution, and not for profit.

(e) All property, real or personal, held and occupied by the trustees of schools, and school-lands of the respective townships for the use of public schools.

(f) Property appropriated to and occupied and used for any hospital or charitable institution.

(g) Wearing apparel of every person, not including jewelry or watches.

(h) Provisions on hand necessary for family consumption.

(i) All farm products, raised in this State, in the hands of the producer.

(j) One gun (for each owner) kept in private use.

(k) All poultry.

(l) Household furniture not to exceed two hundred and fifty dollars in value.

(m) Two cows and calves.

(n) Ten head of sheep or goats.

(o) All colts, foaled in this State, under three years old.

(p) Farming implements used for agricultural purposes.

(q) All property of agricultural and mechanical associations and of fairs used for promoting their objects.

(r) The libraries of all persons.

(s) All pictures and works of art not kept or offered for sale as merchandise.

(t) The tools of any mechanic necessary for carrying on his trade.

(u) Ten head of hogs; and

(v) All permanent factories hereafter established in this State before the first day of January, 1900, for working cotton, jute, ramie, wool, silk, furs, metals, and all other manufacturing implements or articles of use in a finished state shall be exempt from taxation for a period of ten years. Any factory which has been abandoned for not less than three years, and commencing operations within two years from November 1st, 1896, shall be entitled to such exemption. A corporation, or person claiming exemptions under this paragraph (v) shall apply in writing to the auditor of public accounts, giving full information as to the property proposed to be exempted, the kind of articles to be manufactured; and the auditor, with the written advice of the attorney-general, shall determine whether the property is exempt. The auditor shall notify the assessor of the county or municipality, in writing, of his decision in the premises, stating distinctly the property to be exempted and the date when the exemption begins and ends. A factory or manufactory belonging to or being a trust, combine, or pool, shall not enjoy exemption from taxation.

No. 5

Brf. of Bowers & Mayes for Pltfs. in Err.

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Filed Oct. 4, 1901.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 5

THE GULF AND SHIP ISLAND RAILROAD COMPANY, ET ALS.,
Plaintiffs in Error,

vs.

GEORGE P. HEWES, TAX COLLECTOR,
Defendant in Error.

Brief in Behalf of Plaintiffs in Error.

EATON J. BOWERS,
EDWARD MAYES,
For Plaintiffs in Error.

"The Legal Printer," J. G. Hanner, 628 Camp St., N. O., La.

Supreme Court of the United States,

OCTOBER TERM 1901.

No. ———

HE GULF AND SHIP ISLAND RAILROAD COMPANY, ET ALS.,
Plaintiffs in Error,

versus

GEORGE P. HEWES, TAX COLLECTOR,
Defendant in Error.

In Error to the Supreme Court of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This writ of error presents for review a final judgment of the Supreme Court of Mississippi (Record page 15) which affirmed a decree of the Chancery Court of Harrison county in favor of the defendant in error, George P. Hewes, as Tax Collector, against the plaintiffs in error, the Gulf & Ship Island Railroad Company, who were complainants in the court of original jurisdiction.

Ad valorem taxes imposed and levied upon the railroad of the Gulf & Ship Island Company, and a privilege tax, for the year 1896, form the subject matter of the controversy. The litigation originated by a writ of injunction, issued on a bill filed by the railroad company, against the tax collector; which injunction was dissolved on demurrer to the bill.

The railroad company denied liability, upon the ground that, under a valid contract with the state of Mississippi, made in 1882 and still in force, although nearly expired, the property upon which the said taxes were imposed, or sought to be imposed, was exempt from taxation; and also that, by the same contract, the company itself was exempt from the payment of privilege taxes. As the judgment now sought to be reversed adjudges the right of recovery of the taxes in question, and subsequent legislation is thereby enforced, the case arises under the contract clause of the constitution of the United States (Art. 1, Section 10).

The tax collector, defendant below, and defendant here, challenges the jurisdiction of this court; and then, on the merits, contends (1) that the statutory contract relied on by the railroad company was unconstitutional and void from the beginning; and (2), that if valid, it was repealed by subsequent legislation as explained below.

Statement of the Case.

In order that this case may be fully understood, it may be well to review the history of the railroad company whose contract right is now in question, as that history is shown by the public legislation of the state.

The Gulf & Ship Island Railroad was originally incorporated on March 5th, 1850 (see Laws 1850, page 324). This charter did not contain any exemption clause.

By the act of March 16, 1852, the state subscribed for $2,000 of stock, the money paid therefor to be devoted to estimates and surveys (Laws 1852, page 94).

By the act of March 1, 1854 (Laws 1854, page 168), the company's charter was amended; and by Section 11 of the amendatory act it was provided that the "property and investments of the company connected with this enterprise, within this state, *shall not be subject to taxation until the road shall be in full operation and completed.*"

By the act of Aug. 11th, 1856 (11 U. S. Statutes at Large, p. 30), the Congress of the United States granted lands in the state of Mississippi in aid of railroads. This grant was accepted by the State on the 2nd day of February, 1857. (See Laws of 1856-1857, page 104); and on the 3rd of December, 1858, part of the lands so donated by Congress were by the state granted to the Gulf & Ship Island Railroad (See Laws 1858, Called Session, page 118).

By the act of November 18, 1857, the charter of the company was further amended, and the state took $5,000 of stock in the same (Laws 1857, page 37).

On the 10th of February, 1860, the state memorialized Congress, praying for an additional land grant to the Gulf & Ship Island Railroad (See Laws, page 189).

In this memorial, the legislature declares, amongst other things, that "The building of the Gulf & Ship Island Railroad is an enterprise of great importance to the interest and prosperity of the state of Mississippi, and important to the agricultural and commercial development of the western states and northwestern territory"; also that the "federal government is interested in having the means for a speedy transit in time of war to this otherwise almost defenseless coast"; and also that "The lands in the southern portion of Mississippi through which this road is designed to run, are valueless without the success of this enterprise, being valuable for lumber and the production of turpentine alone, which, to be profitable, must have cheap and speedy transportation."

By the act of February 9, 1860 (Laws 1860, page 190), the

state further subscribed for $15,000 additional stock in the company, exchanging for the same, stock which it held in three railroads in the state which had been built.

By the act of November 30, 1860 (See Laws 1860, Special Session, page 34), the counties of Rankin and Madison were authorized to subscribe for stock in said company.

The late civil war having begun, by act of August 2, 1861 (See Laws 1861, page 36), the collection of the railroad taxes in those counties was suspended; and it was further provided that "Said company is hereby authorized to suspend all action until one year at least after such peace shall be restored, without impairing or destroying any right or privilege now belonging to said company."

By the act of January 28, 1862 (See Laws 1862, page 248), all public lands not otherwise appropriated, lying within fifteen miles of the line of the railroad, were granted to the Gulf & Ship Island Railroad Company; *provided,* that such grant should not apply to any lands lying along the projected line "ten miles beyond where the said railroad shall not be finished within twenty years from the passage of this act."

On Nov. 16, 1865 (See Laws 1865, page 477), the legislature adopted a resolution requesting the president and directors of the company to report the condition of the company, and whether there was any reasonable prospect of resuming operation, and when, etc.

On the 30th of October, 1866 (See Laws 1866, page 18) the governor of the state was authorized to appoint an agent to secure a regrant of lands from Congress to the Gulf & Ship Island Railroad, and an appropriation was made to pay the agent's expenses.

In the year 1872, the legislature adopted another memorial to Congress, approved Dec. 14, 1872 (See Laws 1872, page 155), praying for a revivor of the grant made to the Gulf & Ship Island Railroad in 1856.

In this memorial, the legislature says that "Without this road the region of country through which it would pass must remain comparatively a dense wilderness for generations to come; with this road constructed and in operation, this country now so isolated would fill up with a large population, its unsurpassed wealth of timber would become available to the ever increasing demand for lumber, and its agricultural products would find an easy transit to the commercial marts of the world," etc.

On the 19th of April, 1873 (See Laws 1873, page 609), Congress having failed to act upon the preceding memorial, the legislature of Mississippi "believing that the construction of a road from Mississippi City to Helena, Arkansas, *via* Jackson, Mississippi, would lead to the development of the harbor of Ship Island," etc., memorialized Congress, praying for the grant of those lands to the Mississippi City and Helena Railroad. It will be observed that this railroad, as to its route from the Gulf to Jackson, was substantially on the same line with the projected Gulf & Ship Island.

On the 23rd of February, 1882 (See Laws 1882, page 849), a new charter was granted to the Gulf & Ship Island Railroad Company; and section 18 thereof, which is elsewhere herein more fully set forth, provided that all of its property "in this state, necessary or incident to the full exercise of all the powers herein granted, *shall be exempted from taxation for a term of twenty years from the passage of this act.*"

The same legislature, on the 8th of March (Laws of 1882, p. 131) adopted a memorial to Congress praying for a re-grant to the Gulf & Ship Island Railroad of the lands originally granted in 1856. This memorial is quite lengthy, and is printed in full herein in the Appendix, on page 10.

Amongst other things, it sets forth as follows:

> "No enterprise in our state has ever received more repeated and cordial endorsement from our legislature and people than this. At its present session, our legislature

has granted a new act of incorporation with liberal provisions; thus again attesting the continued and earnest interest felt by our people in this important work. It is almost superfluous to dwell on the great benefits to our state which would result from the construction of this road..... It is not our state and its people alone who would reap advantages from the construction of such road. The work would present a semi-national importance in affording to the grain growers of the west and northwest the shortest and cheapest line of transportation to the seaboard," etc.. ...."It is manifest the road can not be built by corporate or individual subscriptions in our own state. The well known pecuniary condition of our people forbids such a hope. But we have good reason to believe that if the former grant of government lands can be revived a substantial basis of credit will be created, and with this material aid assured, there will be no difficulty in enlisting northern and foreign capital to insure the early completion and equipment of the road," etc.

Congress, moved no doubt by this memorial, exempted the grant in aid of the Gulf & Ship Island Railroad from the general forfeiture act of Sept. 29, 1890 (U. S. Statutes at Large, Chapter 1040, page 496), and by Section 7 of said act all lands lying south of the junction of this road with the New Orleans & North Eastern Railroad—Hattiesburg—were saved to the road. The act in question referred to the grant as "A grant of land to the "state of Mississippi, for the purpose of aiding in the construc- "tion of a railroad from Brandon to the Gulf of Mexico, *com- "monly known as the Gulf & Ship Island Railroad.*" The act of the Mississippi legislature, December 3rd, 1858, designated this road as the recipient of the grant, and the memorial of 1882 dealt with a grant made by the Government in 1856 in aid "of "the construction of the Gulf & Ship Island Railroad"; *to which*

road, the memorial recited, "the legislature at its present session "has granted a new act of incorporation with liberal provisions, "thus attesting the abiding and earnest interest felt by our peo- "ple in this important work." It is therefore apparent that this corporation dates from the act of March 5th, 1850, and that the act of 1882 was merely the recognition and continuance of an existing corporation with well defined charter rights.

On the 13th day of March, 1884 (See Laws 1884, page 971), an act was passed "To facilitate the construction of the Gulf & Ship Island Railroad, and for other purposes," which provided, amongst other things (Section 8), that "Said Gulf & Ship Island Railroad Company is hereby subrogated *to all the rights and privileges* heretofore granted by the state of Mississippi to the Gulf & Ship Island Railroad Company; and shall have the right to sue and enjoy such field notes, maps, and surveys as have been heretofore made in the interest of said road as were authorized and granted by the state under acts approved March 2, 1854, and December 3rd, 1858."

The original bill in this cause (filed Jan. 1, 1897) shows that complainant then had in operation a line of railroad running from Gulfport, in the county of Harrison, in said state, to Hattiesburg, in the county of Perry, in said state, a distance of 70.22 miles, as well as a branch line running from Gulfport in said county and state, to Handsboro, a distance of about four miles, which branch line was constructed by complainant during the month of November, A. D. 1896.

Since this bill was filed, the same railroad has been further completed from Hattiesburg to Jackson, Mississippi, and is now in daily operation from Jackson to Gulfport.

It may aid the court to dwell for a little upon the origin of the legislation in question.

In *M. & O. Railroad vs. Tennessee,* 153 U. S. 486, 502, which

dealt with an exemption from taxation in a railroad charter, it was said:

> "Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail."

From the year 1870, in which year was convened the first legislature of Mississippi after the ratification of the constitution of 1869, until after 1882, the legislature of that state deemed it necessary for the public good to invite the investment of capital, and especially of foreign capital, in the construction of railroads. The resources of the state could not be developed without railroads, and all progress made would, according to the view which then obtained, be stayed unless means were found for this necessary public improvement. The public treasury was bankrupt, and the public credit was shattered. The issue of state bonds in aid of public improvements undertaken by railroad corporations, even if the bonds could then have been marketed, was impracticable, for the constitution recently adopted had prohibited the pledging or loan of the credit of the state (Constitution 1869, Article XII., Section 5).

The levy of a general tax to assist in the building of railroads would have been fruitless, as well as an unbearable burden upon a ruined community, for at that time the condition in Mississippi was indeed miserable. The resources of the state had been exhausted by the struggles and sacrifices of the civil war. The great revolution in industrial, agricultural and economic conditions, resulting from that terrible strife and from the emancipation of the slaves, had left the community so poor that with difficulty could the inhabitants bear the burden of the taxes necessary for maintaining the local government.

The public records show that millions of acres were being abandoned and forfeited to the state for non-payment, even of

such taxes as were needed to be raised for the ordinary expense of the state.*

Even as late as 1881, we find the state raising funds for levee purposes by selling nearly two million acres of forfeited lands of the levee board, and such sales, as is matter of common knowledge in Mississippi, were made at the incredibly low figure of 12½ cents per acre (See note p. 10 below).

The distress of the community was set forth in petitions from the legislature to Congress. The paramount interest of the whole community was clearly the building of railroads so as to afford means of communication and transportation, thereby developing the resources of the state, yet the nature of the country was such (in some parts its topography, in others its poverty, and in all the sparseness of its population) that both the construction and the maintenance of railroads were unusually difficult and doubtful; and railroad enterprises then, and for many years, gave no promise of profit.

Looking especially to the country through which it was proposed to build this railroad denominated the Gulf & Ship Island, it is to be observed that we have the explicit declaration of the legislature of Mississippi itself, addressed to Congress in the memorials hereinbefore mentioned:

1. In memorial of 1872 (Laws of 1872, page 155), in which it was said that "Without this road, the region of country through which it would pass, must remain comparatively a dense wilderness for generations to come";

2. In the memorial of 1882 (Laws 1882, page 131), that

> "This liberal and valuable donation was lost by no supineness or indifference of our people, but by the interruption of all works of internal improvement caused by the late war; and since its close, to the prostration and poverty

*Appendix to Senate Journal, 1870, pp. 20-25; id. 1871, p. 1 (Gov. Alcorn's Message); id. (List of Lands held by the State); Laws of Miss. 1878, pp. 243-245; Appendix to Senate Journal, 1882 (Gov. Lowry's Message); Laws 1882, p. 124; Murdock vs. Chaffe, 67 Miss. 740, 750.

> which it entailed..... It (the railroad) would speedily populate and develop the resources of a large section of our state hitherto isolated, and neglected for want of facility of access..... It is manifest the road can not be built by corporate or individual subscriptions in our own state. The well known pecuniary condition of our people forbids such a hope. But we have reason to believe that if the former grant of government lands can be revived, a substantial basis of credit will be created, and with this material aid assured, there will be no difficulty in enlisting northern and foreign capital to insure the early completion and equipment of the road."

In such condition of affairs, it must appear to all candid minds that the legislature exercised a wise forethought when it determined that the only chance of railroad development and improvement was to induce the investment of capital belonging to the inhabitants of more prosperous states. The legislature did undertake, avowedly, to induce foreign investors to build railroads in the state, thus to provide the necessary means of communication and transportation upon which, as it conceived, and conceived correctly, future progress and development and prosperity depended.

The state was in the attitude of soliciting subscriptions of foreign capital in the formation of railroad corporations, endeavoring to induce investors to undertake the risk of necessary public improvements for the benefit of the people of the whole state, with the hazard of loss, and, perhaps financial ruin, to the promoters, and by offering a temporary exemption from taxation as a consideration, by way of contract, for the acceptance of its proposals.

The charter which was granted in 1882, pursuant to this policy, to the Gulf & Ship Island Railroad, and on which the bill in

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Note 2—Department Reports 1882, Report of Commissioner of Immigration, pp. 11, 19; Murdock vs. Chaffe, 67 Miss. 740, supra; Laws of Miss. 1888, p. 40.

this case for relief is based, was one of these cases; and it says in express terms as follows, in Section 18:

> "That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this state, necessary or incident to the full exercise of all powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act," etc.

Nor does this act stand alone. The extent to which such policy was adopted by the legislature may be judged from the fact that, during the session of 1870, ten railroad companies were incorporated, with each of which the legislature made a charter contract appropriating annually in aid of the company, the taxes to which such company should be liable for a term of years; and eight companies were similarly incorporated during the session of 1871, twelve during the session of 1872, and eleven during the session of 1873. Between 1870 and 1884, inclusive, forty-four railroads were incorporated, with each of which a contract of appropriation of taxes in aid, was made by the legislature on behalf of the state of Mississippi; and forty-two other railroads were incorporated, which were granted exemptions similar to that granted in the case at bar.

In nearly all of these charters, whether of contract of appropriation of taxes, or whether a plain exemption like the one at bar, the privilege or immunity was expressly stated to have been given as an inducement to investment in the railroad projected.

A list of these charters is set forth in the Appendix to this brief, pages 19 to 24.

The proposals made by the state in such charters were, in

several instances, accepted and performed in good faith, and they were accepted and performed in good faith by the Gulf & Ship Island Railroad Company.

In 1860, there were 862 miles of railroad in Mississippi (Poor's Manual, 1897, page XVI.); in 1880, just before the granting of the new charter involved in this case, the total mileage had increased to 1127 (*ib.*); in 1886, after the completion of the Louisville, New Orleans & Texas Railway, incorporated in 1882, the total number of miles was 2,111 (Poor's Manual, 1897, page XI.); and this was increased to 2,552 by the year 1896 (Poor's Manual, 1897, page XVI.).

When this bill was filed, as it shows, in January, 1897, the Gulf & Ship Island had constructed its line from Gulfport, on the Gulf of Mexico, to Hattiesburg, a station on the railroad which runs from New Orleans to Meridian, and thus had already opened up the lower central portion of the state of Mississippi, as had so long been desired by the legislature.

The result of the construction of railroads under the policy outlined above, has been such as to increase the value of property in the Mississippi delta district and in the pine land district of south Mississippi, penetrated by railroads under this system of legislation, to an enormous extent, and to convert into territories of great value, and vast productiveness either of cotton or lumber, lands which prior thereto, were almost absolutely worthless, and the state and counties now collect from this territory immensely increased revenues, without any increase of the rate of taxation.

Specification of Errors.

The plaintiffs in error assert, and intend to urge and rely upon, the following errors of the court below, viz:

1.—That the court erred in holding that the provision of section 18 of the charter of 1882 did not constitute a valid and irrepealable contract between the state and the railroad company under the Mississippi constitution of 1869.

2.—The court erred in holding that such exemption contract originated with the charter of 1882, and not under the charter of 1854, and that the same was subject to the constitution of 1869.

3.—The court erred in holding that the constitution of 1869 prohibited the making of an irrepealable contract for exemption from privilege taxation.

4.—The court erred in holding that the exemption contract herein claimed, was not ratified and continued by section 181 of the constitution of 1890.

5.—The court erred in permitting recovery of taxes under and by virtue of revenue laws passed subsequent to the charters of 1854 and 1882, and thereby giving effect to statutes which impaired the obligation of the contract in suit.

The questions arising in this case may, in a general way, be stated as follows:

1. *The jurisdiction of this court.*

2. *The constitutionality, as to property taxes, of the act of 1882, containing the exemption.*

3. *The constitutionality of the same act, as to privilege taxes.*

4. *The effect of Section 181 of the Constitution of 1890.*

5. *The impairment of the contract of exemption by subsequent legislation.*

1.—The Jurisdiction of This Court.

The jurisdiction of this court to review the decision of the Supreme Court of Mississippi, is challenged on three grounds:

1. No federal question is raised or involved.

2. No federal question was raised at the proper time or in the appropriate way.

3. The exemption claimed was repealed by the provisions of the Mississippi Code of 1892, and the charter relied on was granted after the decision of the case of *Mississippi Mills vs.*

Cook, 56 Miss. 40, which held that exemptions were repealable at the will of the legislature.

That a federal question is involved in this cause seems too plain for disputation.

The original bill to enjoin the tax collector of Harrison county was filed January 1, 1897. It charges (See Record, pages 2 and 3), in express terms, the incorporation of the Gulf & Ship Island Railroad Company on the 23rd of February, 1882; and it sets forth in full the eighteenth section of the charter of incorporation, which provided as follows:

> "*Be it further enacted,* That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to *make certain in advance* of such investment, *and as an inducement and consideration therefor,* the taxes and burdens which the state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads, and appurtenances, and all its property in this state, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act."

The bill further charged that "By the terms of said Section 18 the property of complainant" was "exempt from any and all taxation," up to the 23rd day of February, A. D. 1902. The bill further charged that notwithstanding the exemption aforesaid, which "is in full force and has never been repealed, the Railroad Commission of the state of Mississippi have, in violation of the rights of complainant, returned its said property for taxation, and have forwarded to George P. Hewes, tax collector of Harrison county, the assessment of the valuation of property of complainant," etc.

The bill also charges that the tax collector has notified the complainant that unless the taxes are paid within the time prescribed by law, he, the tax collector, would proceed to collect

such amount by distress and levy upon the property of complainant; and it charges that the said taxes are, for the reason aforesaid, illegally demanded of complainant.

This original bill being filed on the first day of January, 1897, was filed, "In an obvious reliance upon the two previous decisions of the Supreme Court of Mississippi," to-wit: The *Mississippi Mills* case, 56 Miss., page 40, and the *Lambert* case, 70 Miss., page 779; just as this court remarked in the case of *Yazoo, etc., R. R. Co. vs. Adams,* 180 U. S., page 1, occurred when the railroad companies in that case went to trial.

And the original bill in this case set forth the right and claim of the company to its exemption as a contract in terms quite as full and complete as those terms which were employed by the railroad companies in the *Adams* case in their plea. As the court will see by referring to the transcript of record in the case of *Y. & M. V. R. R. Co. vs. Wirt Adams,* page 55 (which transcript appears in this court under the file number 17,341), it will be seen that the plea of the railroad company did nothing more than to identify the company and connect it with its charter; to set up its right of appropriation of taxes, and to allege performance of the conditions on which that appropriation was to be enjoyed.

It was claimed in that case, as here, that this court had no jurisdiction because no federal question was involved. But this court denied that claim, and held that under such plea the "federal question was necessarily involved and must have been passed upon at the first hearing."

This court said as follows:

> "In short, the case is one of those frequently arising under the second clause of Rev. Stat., Sec. 709, in which the validity of a state statute under the constitution of the United States is necessarily drawn in question, and the decision of the state court being in favor of its validity, this court will take jurisdiction, though the federal question be

not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the 3d clause of the section, where a right, title, privilege, or immunity is claimed, that the federal question must be specially set up."

Secondly.—The second ground alleged for dismissal for want of jurisdiction is that "No federal question was raised at the proper time or in the appropriate way."

This ground is effectually disposed of by the preceding paragraph. We have shown that the federal question was necessarily involved from the beginning, and that it did not need to be expressly raised. Wherefore, it follows as a necessary conclusion that it was raised at the proper time, if it was involved from the beginning; and also that it was raised in *an* appropriate way, even although it might be said that it might properly also have been raised in some other way.

But the plaintiff in error is not compelled to rest this branch of its case on the preceding argument. Out of the abundance of caution, it amended its bill in the trial court, on the 27th day of September, 1897 (See Record, pages 8 and 9); and in the said amendment it *expressly* set up the exemption as "a contract between the incorporators and stockholders of complainant corporation and the state of Mississippi"; and it was further averred that the Board of Supervisors of Harrison county contended "that said exemption from taxation *has been repealed by the provisions of the Annotated Code of 1892*," and complainant averred both that such contention was untrue, and also averred that "To permit the state to repeal its contract of exemption so entered into by it would be a violation of the tenth section of article 1 of the constitution of the United States"; and complainant *expressly* pleaded the protection of such section and article against any repeal of the exemption.

To the bill so amended, the chancellor sustained a demurrer (Record, page 11); and from his decree in the premises, the ap-

peal was taken to the Supreme Court of the state of Mississippi, on which the judgment of affirmance was rendered, from which judgment of affirmance this writ of error was prayed.

Thus it appears that the contract clause of the constitution of the United States was not only necessarily involved from the beginning, but it was also expressly set up by the amended bill, was demurred to, and the demurrer sustained.

It is true the Supreme Court of Mississippi, in deciding this cause, delivered no written opinion. The cause was decided on the 8th day of May, 1898 (See Record, page 15), and no written opinion was delivered for the manifest reason that the court considered the expression of its views contained in the case of *Wirt Adams, State Revenue Agent, vs. Y. & M. V. R. R. Co.*, delivered on the 20th of February previous, to be sufficient.

It was impossible for the chancellor to sustain the demurrer and for the Supreme Court to affirm that judgment without finding that the sections of the federal constitution specifically pleaded constituted no bar to the demand for taxes. This case is directly covered by the following language of Justice Brewer in *Williams vs. Eggleston*, 170 U. S., p. 304:

> "Inasmuch as plaintiff in error, when sued in the state court, specifically set up certain sections of the federal constitution as a bar to the proceedings against him, and the judgment of the state court was that they presented no such bar, it is not open to question that this court has jurisdiction, and the motion to dismiss must therefore be overruled."

Moreover, the Chief Justice of the Supreme Court gave his certificate that legislation of the state of Mississippi subsequent to the act of 1882, was drawn in question on the ground of such legislation being repugnant to Section 10 of Article I. of the constitution of the United States, etc. (Record, page 17).

It can not be said that the subsequent legislation complained

of was not pointed out with sufficient distinctness. The amended bill, as has been shown above, expressly set forth that the Board of Supervisors relied upon the provisions of the Mississippi Code of 1892. That is a sufficient indication of subsequent legislation.

But even if no such averment were contained in the amended bill, the fact that the state courts did enforce subsequent taxing laws against the contract right itself is sufficient to give this court jurisdiction, even although in such enforcement the subsequent acts and laws were in no way directly cited or alluded to.

In *New Jersey vs. Wright*, 117 U. S. 648, this court said:

> "Where it is charged that the obligation of a contract has been impaired by a state law, as in this case, by the general tax law of New Jersey as administered by the state authorities, and the said courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

See also in *McCullough vs. Virginia*, 172 U. S. 102, this court held that where the state court places its decision distinctly on the ground that the act in controversy was unconstitutional and void originally, but at the same time it is clear that the judgment of the state court did give effect to subsequent statutes, such judgment would be reviewed by this court, and in reviewing the same, this court is not limited to a mere consideration of the language used in the opinion below, but may examine and determine what was the real substance and effect of the decision. Also, to the same effect, see *Chapman vs. Goodnow*, 123 U. S. 540, 548; *Houston, etc., Railroad vs. Texas*, 177 U. S. 66, 100.

Nor does the case of *Yazoo Railroad Company vs. Adams*, 180 U. S. 41, oppose the foregoing position. It is true that in that case this court dismissed the writ of error; but it did so for reasons which do not touch the case at bar. There the only question

really involved in the controversy was the proper construction of the exemption clause of the charter, and the attempt was to get this court to take jurisdiction on a claim that there were statutes subsequent to the charter which might have been, but were not, relied upon as raising a federal question concerning the construction of the contract. This court emphasized the fact that no state statute whose validity was challenged was pointed out in the record; none was set up in the pleas; none was mentioned in the opinion of the court; that in fact the fourth plea expressly averred that the exemption had never been repealed by the legislature of the state; and this court declared that, "For aught that appears the very statute under which this rule was taxed was in existence before the road was chartered, although others prescribing a different method of assessing and collecting such taxes may have been passed subsequent thereto." Moreover, in that case there was a full and elaborate opinion of the court, showing exactly what the court held and what were the questions mooted, and the opinions showed that no federal questions had been raised in the discussion before the court, and that none was decided by the court. In such case the court held that jurisdiction could not be conferred by the certificate of the Chief Justice alone.

If it should be contended that it was incompetent to raise a federal question by an amendment to the original bill, we reply by a citation to Section 542 of the Annotated Code of Mississippi, 1892, and the following decisions:

Richardson vs. Rolfe, 31 Miss. 616;
Ward vs. Whitfield, 64 Miss. 754;
Smith vs. Harrington, 49 Miss. 771;
Kimbrough vs. Curtis, 50 Miss. 117;
Hanserd vs. Gray, 46 Miss. 75;
Jeffries vs. Jeffries, 66 Miss. 216;

from which it is clear that it is the practice in Mississippi to allow amendments liberally at any stage of the proceedings, and that amendments incorporated in the bill at any time have the

same effect as if they had been originally written therein; besides, by the order sustaining the first demurrer, signed September 13th, 1897, filed September 16th, 1897 (Record, page 8), complainant is expressly given leave to amend his bill, and it must be apparent that this leave was given for the express purpose of permitting the insertion of the allegation raising the federal question. Moreover, there was a written agreement (Record, page 10), that the demurrer should be considered as re-filed to the bill *as amended.*

If it be contended that the federal question was ignored or waived because it was not expressly assigned as error in the Supreme Court of Mississippi, we reply, that the settled practice in Mississippi in chancery cases is to assign one error, *i. e.* that the court erred in the rendition of the decree below, and under this assignment every question is raised. This is especially true where a case stands on bill and demurrer, because but one error was committed, the error of sustaining the demurrer and dismissing the bill.

A resort to the brief filed in that court will demonstrate beyond cavil that the federal questions were fully discussed, and the same fact appears from the certificate of the Chief Justice of the state of Mississippi.

Thirdly.—The third ground of objection to the jurisdiction of this court is to the effect that the exemption was repealed by the provisions of the Mississippi Code of 1892, and that there is a written stipulation in the cause that the charter was accepted and the road constructed after the decision of the Supreme Court of Mississippi in the case of *Mississippi Mills vs. Cook,* 56 Miss. 40, and that such case decided that such exemption was repealable at the will of the legislature.

The fact that the original bill was manifestly filed in reliance upon the rule of legislative power as to the granting of an exemption laid down in the *Mississippi Mills* case; and the further fact that there was a stipulation made in the Mississippi Supreme

Court to the effect that in accepting the charter and constructing the road, the incorporators and stockholders invested their money relying upon the adjudications of the Mississippi Supreme Court in that case, do not deprive plaintiffs in error of the benefit of the federal question otherwise distinctly raised in the record. The bill is to be construed as a whole, so that each allegation must mean something; the contract of exemption was clearly set forth, and by the first amendment to the bill the right of the state to abrogate it was expressly challenged and the protection of the federal constitution specifically invoked. Nothing in the stipulation filed after the cause had reached the Supreme Court, destroyed the force of this pleading. It is manifest that it was the intention of the parties to stipulate that the complainant below was to have such benefit as might accrue to it from the proposition that it had constructed its road relying on the decision in the *Mississippi Mills* case, to the effect that the constitution of 1869 did not forbid the legislature to grant an exemption. No other construction is consonant with reason and no other will permit the bill as a whole to stand.

This question is settled by this court in the case of *Illinois Central Railroad Co. vs. Wirt Adams, Rev. Agent,* 180 U. S., p. 28. There the bill set up an exemption under an act of 1882, set up acceptance of the charter in reliance on the *Mississippi Mills* case, and did not deny the right of the legislature to repeal the statute. But the federal question was raised.

It is idle, we respectfully submit, to contend that such stipulation intended that the complainant constructed its road relying upon the alleged power of the legislature to repeal its exemption whenever the legislature should so desire.

Besides, it is apparent that the Supreme Court of Mississippi decided the federal question raised in this case adversely to plaintiffs in error. Inasmuch as no written opinion was rendered, this court will rely much on the certificate of the Chief Justice as to what was tried and decided and that certificate emphat-

ically and unequivocally states that the federal questions were raised and were decided adversely.

A full consideration of this objection to the jurisdiction of the court, its want of soundness and its want of fairness to the plaintiffs in error, would involve a premature and harassing discussion of the entire history of the legislation germane to this subject and of the adjudications of the state bearing upon these questions. In this immediate connection we suggest that it would be more convenient to this court to consider the effect of the *Mississippi Mills* case upon the jurisdiction of this cause, together with the general merits of the case, and the effect of that decision in connection therewith. It is not worth while to take two bites at a cherry.

The subsequent legislation which is claimed by the Supreme Court of Mississippi to have *repealed* all railroad exemptions is:

1. Act of 1886, Sec. 6 (Laws 1886, p. 23). Appendix, p. 27; and

2. Code of 1892, Sections 3379 and 3744 (Appendix, pp. 21 and 23).

See *Railroad Co. vs. Adams*, 77 Miss. 194, 291-292.

2.—The Constitutionality, as to Property Taxes, of the Act of 1882 containing the Exemption.

The act of 1882 in question was the new charter granted to the Gulf & Ship Island Railroad Company which appears in the Laws of 1882, page 849; and Section 18 thereof, so far as necessary to set forth herein, is as follows:

> "Sec. 18. *Be it further enacted*, That in order to encourage the investment of capital in the works which said company is authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads, and appurtenances, and all its property in this state, necessary or

incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act."

The court will remember that this new charter of 1882 was granted to the Gulf & Ship Island Railroad Company, which in fact was originally incorporated by the legislature of Mississippi, as shown on page 2 of this brief, on March 5th, 1850: also that by act of March 1st, 1854 (Laws 1854, page 158), the company's original charter was amended, and Section 7 of the amendatory act provided that "The property and investments of the company, connected with this enterprise within this state, shall not be subject to taxation until the road shall be in full operation and completed."

Our argument under this head, therefore, will be reduced to two main propositions:

1.—The exemption granted by the act of 1854 to the Gulf & Ship Island Railroad Company until the road should be in full operation and completed, was not only a contract, but also was irrepealable in its nature, and in this view it is immaterial what was the true intent and meaning of Section 13, Art. XII. of the constitution of 1869, it being beyond the power of the state, even by a new constitution, to impair that contract.

At this late day we take it to be needless to array authorities to this court on the proposition that an exemption of this nature contained in a railroad charter is, in the absence of any reservation of the power to repeal, an irrepealable contract beyond the power of the state to impair, when the charter is accepted.

It is true that the Code of 1857 of Mississippi contained a provision reserving to the legislature the right generally to amend charters; but that provision is immaterial in this cause, because it was enacted three years after the exemption was granted. Prior to the Code of 1857, there was no general law and no constitutional provision in any way restraining the legislature from granting irrepealable exemption contracts.

That the existence of the Gulf & Ship Island Railroad was continuous, that the project had not been abandoned, is shown by the history of the company as previously set forth on pages 2 to 6 inclusive. The court will note, especially, that in the year 1872, on the 14th of December, which was more than three years after the adoption of the constitution of 1869, was approved the legislative memorial to Congress framed for a revivor of the land grant made to the Gulf & Ship Island Railroad in 1856—a clear legislative recognition of the existence of the original railroad company as chartered more than three years after the constitution of 1869 became operative.

If, therefore, it be admitted that the constitution of 1869 was intended to, and did in fact, prohibit the granting of any exemptions whatever to corporations for profit; yet, nevertheless, when that constitution was adopted, there was outstanding an irrepealable and unquestionable grant, and the constitutional provision could not impair it.

Such was the condition of things when the new charter of 1882 quoted above, was enacted. That new charter was accepted.

We may concede that the constitution of 1869 forbade any exemptions by charter, or to a particular corporation, or to corporations in general; yet still, in this particular instance the exemption was valid and effectual legislation, being the mere substitution of one measure of exemption for another. It was not the grant of an exemption originally made; it was a mere change in the duration of that exemption.

In *Memphis & Charleston R. R. Co. vs. Gaines*, 97 U. S. 697, this court held that the legislature of a state can not contract with a company for a surrender of its charter of exemption from taxation, in a way that involves a release from the constitutional mode of taxation, after the charter exemption has expired. But in so holding the court expressly says this:

"There is no doubt of the power of the legislature to

contract with the company for a surrender of its charter exemption in a way that did not involve a release from the constitutional mode of taxation after the charter had expired."

Now, in the Tennessee case, the reason why the new exemption was held to be void was that the stipulations of the contract extended the term or duration of the exemption; while in the case at bar it does not appear that such was the fact. The exemption enjoyed under the act of 1854 extended until after full completion and operation. The substituted exemption under the act of 1882, extended for twenty years from the date of the act. Whatever question might arise if it should turn out that the road should be *"completed and in full operation"* before the expiration of twenty years from 1882, that question is not presented in this case. Here the bill affirmatively shows that when filed the road had only been completed so far as Hattiesburg in the state of Mississippi, and had not then reached its northern terminus. (See the Acts of 1850, 1854, 1882 and 1884 in the Appendix, pages 1 and 2, and 8 to 14 inclusive.)

It can not be said that this contention is not available to the plaintiffs in error for the reason that the original bill placed its right upon the act of 1882. The argument which we make rests upon the value and authority of the act of 1882; and the preceding observations are merely an argument to show why the exemption contained in the act of 1882 is not subject to the rule of the constitution of 1869, whatever that rule may have been. It was the continuation of a valid exemption existing prior to, and if need be in defiance of, the constitution of 1869.

It was not necessary in the state court to plead or prove the railroad charters, those being matters of which the state courts take judicial knowledge. In *Railway Co. vs. Baird,* 76 Miss., page 521, the court said:

"We judicially know that the Georgia Pacific Railroad Company was incorporated in 1882, and that it was author-

ized to construct a road from Aberdeen or Columbus, Mississippi, to the Mississippi river," etc.

See, also, *Mississippi State Railroad Commission vs. G. & S. I. R. R. Co.,* 29 Southern Reporter, page 789.

2.—We now submit as an alternative proposition that even if it were true that the act of 1882 was the original grant of incorporation and exemption, the exemption feature did not violate Section 13, Article XII. of the Mississippi constitution of 1869.

A proper presentation of this question involves a brief review of the legislation and adjudications of the state of Mississippi germane to this subject.

For many years prior to the adoption of the Mississippi constitution of 1869, it had been common for the legislature in granting corporate charters, expressly to reserve the right to tax the property of the corporations created. An idea seems to have obtained extensively in the United States and, if the evidence of a common style of legislation is to be accepted, also in the state of Mississippi, that the grant of a charter of incorporation, especially where the property of the company incorporated served a public purpose and was affected with a public use, exonerated such property from taxation. This idea found expression in the adjudications of the courts.

Worcester vs. Western Railroad Co., 4 Metc. 564.

Lehigh Co. vs. Northampton Co., 8 Watts. & Searg., 334.

Vermont Central Railroad vs. Burlington, 28 Vt. 192.

Burroughs on Taxation, Section 73.

Accordingly, as shown above, we find the legislature of Mississippi, beginning with the year 1833, frequently making express reservation of the power to impose taxes; and the legislature of 1866-1867, in granting the charter of the Bradford Machinery Co. (see Laws, page 471), declared that "The property and effects of said company shall be liable to be taxed as

real and personal estate in this state, is or may be taxed"; and in the charter of the Hashuqua Manufacturing Company, declared that "the stock and property of the company shall be liable to such taxes as shall be imposed by the legislature."

This legislation is especially noteworthy because it was adopted by the last legislature which convened before the adoption of the constitution of Mississippi of 1869, in which is found the article under consideration.

The framers of the constitution of 1869 (who were in session in 1868; for the constitution was adopted in convention on the 15th of May of that year) must have had in mind the history of the antecedent legislation in Mississippi, and undoubtedly by the insertion of Section 13, Article XII, intended to subject all corporations to the power of taxation under the general tax laws. They simply intended to convert into a general constitutional reservation of authority, what had been a common practice in creating corporations, but a practice followed by successive legislatures or not, as they saw proper from time to time in dealing with particular cases.

It was not the intention of such constitutional provision to deny to the legislature the right to grant exemptions, either repealable or irrepealable, which had been a constant legislative practice theretofore. Section 13, Article XII. of the constitution is as follows:

"The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

In the year 1878, the Supreme Court of Mississippi decided the case of *Mississippi Mills vs. Cook*, 56 Miss., page 40, construing this provision; and the court determined that this section did not of itself prohibit exemptions, but only declared that the legislature should no longer have the power to grant to a corporation an irrepealable exemption. It emphatically announces the rule that the whole subject of exemptions continued to be within the absolute discretion of the legislature of the

state, so far as the actual imposition of taxes was concerned; that each succeeding legislature, after the granting of a charter, should have the right to determine for itself whether or not the property of any particular corporation or class of corporations should in fact be taxed.

This adjudication was conservative. It is in full accord with the expression of this court in *Piqua Branch vs. Knoot,* 16 How. 369, 389, where, speaking of a statutory contract for a specific tax, it is said that "This act, so far from parting with any portion of the sovereignty is an exercise of it. Has it not a right to select the basis of taxation and determine the amount? To deny either of these, is to take away the state's sovereignty. * * * The vague and undefined and indefinable notion that every exemption from taxation or a specific tax which withdraws certain objects from the general tax law, effects the sovereignty of the state, is indefensible."

The authoritative construction of the Mississippi constitution, subsequently reiterated, as is elsewhere shown in this brief, became as much a part of the constitution of 1869 as the text itself.

Douglas vs. County of Pike, 101 U. S. 677.

This principle has recently received recognition at the hands of the Supreme Court of Mississippi itself.

Adams, State Rev. Agt., vs. Bank, 29 Southern Reporter, 402.

That this construction was not strained or unreasonable, is shown by the legislation of Mississippi for many years prior to the adoption of the constitution, as hereinbefore stated. It came to be the thoroughly settled and recognized law in the state, and so continued for a period of twenty years. In the judicial department, it was followed without break or question, as will be seen by reference to the following cases involving in one way or another the question of the constitutionality of exemptions under the constitution of 1869, or in which the power

of the legislature to grant such exemptions was explicitly recognized as a point of departure.

McCullough vs. Stone, 64 Miss. 378; decided October term, 1886.

Y. & M. V. R. R. Co. vs. Thomas, 65 Miss. 553; decided October term, 1888.

Vicksburg Bank vs. Worrell, 67 Miss. 47; decided October term, 1889.

Attala County vs. Kelly, 68 Miss. 40; decided October term, 1890.

L. N. O. & T. Ry. Co. vs. Taylor, 68 Miss. 361; decided January, 1891.

R. R. Co. vs. Lambert, 70 Miss. 779; decided May, 1893.

In the legislative department, also, the same rule was recognized as settled law. At almost every session of the legislature held between the adoption of the constitution of 1869 and the adoption of the constitution of 1890, exemptions from taxation were granted, not only to railroad companies, but to other corporations for profit, which were supposed to serve in some sense a public purpose. The acts granting these exemptions are referred to in the appendix (pages 19 to 24) and exhibit a fixed and consistent course of legislation upon this subject.

We may form some idea of the extent of this policy from the fact that between the years 1870 and 1890, inclusive, at least 120 acts were passed granting exemptions to various corporations. These acts amount to a legislative construction of the highest authority respecting the true meaning of this portion of the constitution of 1869.

This long continued practice of both the legislative and judicial departments ought to be most convincing as to the legality of these exemptions. No rule of interpretation is better settled in this court than that which gives to such practice and interpretation great weight.

In *the Laura,* 114 U. S. 411-416, Mr. Justice Harlan, citing *Stuart vs. Laird,* 1 Cranch, 299, 308, says:

"Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as it was said in an early case, that the practice and acquiescence under it, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."

And in *Ogden vs. Saunders,* 12 Wheat. 213, 290, Mr. Justice Washington said that the doctrine

"Proceeds upon the presumption that the contemporaries of the constitution have claims to our deference on the question of right because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."

In view of the fact that the investment by stockholders and creditors of the railroad company was clearly alleged in the amended bill (Tr. page 9) to have been made in reliance upon this established practice as to exemptions and of the authoritative interpretation of the highest court of the state affirming the constitutional power to exempt, the following language of Mr. Justice Swayne, in *Township of Pine Grove vs. Talcott,* 19 Wall. 666, 677, is singularly applicable:

"When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal."

See, also, *Briscoe vs. The Bank of the Commonwealth of Kentucky,* 11 Pet. 257, 318; *Prigg vs. The Commonwealth of*

Pennsylvania, 16 Pet. 539, 619; *Cooley vs. Board of Wardens of Philadelphia et al.,* 12 How. 299, 315; *Auffmordt vs. Hedden,* 137 U. S. 310, 329; *Schell's Executors vs. Fauche,* 138 U. S. 562, 572; *Field vs. Clark,* 143 U. S. 649, 691; *McPherson vs. Blacker,* 146 U. S. 1, 27; *Kennedy vs. Gies,* 25 Mich. 83, 92. The Mississippi authorities are to the same effect: *Daily vs. Swope, Guardian, etc.,* 47 Miss. 367, 383; *French vs. The State,* 52 Miss. 759, 762; *Shotwell vs. Covington,* 69 Miss. 735, 738; *Chrisman vs. Brookhaven,* 70 Miss. 477, 483.

As Simrall, J., said in *Hawkins et al. vs. Carroll Co.,* 50 Miss. 735, 752 (1874):

"At the time of the adoption of the constitution, the power of the legislature to authorize municipal aid to these enterprises, coupled with the delegated authority of taxation, was well established, both by legislative precedents and judicial decisions in this and other states."

And Mitchell, J., said in *State vs. Luther,* 56 Minn. 156, 164:

"This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

The Supreme Court of California said in *Emery vs. Reed,* 65 Cal. 351:

"We have frequently said that, with respect to laws passed under the late constitution, the construction put upon them by the highest court in existence under it, would be accepted by us without regard to our own views in respect to the correctness or incorrectness of that construction."

And this court, in *Stearns vs. Minnesota,* decided December 3, 1900, said, on this point:

"It is worthy of notice that the alleged invalidity of this contract, in respect to taxation, was not complained of for thirty years. Whether the revenues of the state were benefitted or injured by this method of taxation we are not advised, but it does

appear that neither party challenged it. Both the railroads and the state accepted and acted under it for nearly a third of a century."

Not until the decision of the Mississippi Supreme Court in *Adams vs. Yazoo & Mississippi Valley Railroad Company* (in June, 1898,) was the theory developed that all exemptions of corporate property were invalid.

Inasmuch as the Supreme Court of Mississippi, in the case of *Railroad Co. vs. Adams,* 77 Miss. 194, decided in June, 1898, has undertaken to criticise and overrule *Mississippi Mills vs. Cook,* and since the amended bill in this case expressly avers that the investments in this railroad were made on the faith of the rule of legislative power expounded in the latter case, and without that rule would not have been made at all (which averment is admitted by the demurrer), it becomes material to study the *Mississippi Mills* case, and also the criticism of it by the recent decision, quite closely. The course of the Mississippi court in the matter has, we submit, set the whole question at large; and this court will, under the circumstances, follow its own judgment, as to the true meaning of Section 13, Article XII.

The discussion of that case, and its overruling, by the present Supreme Court of Mississippi, will be found in 77 Miss. Rep., pp. 272 to 275, inclusive.

It is impossible to consider carefully the case of *Mississippi Mills vs. Cook,* and then to study the criticism of it by the Mississippi court in its later decision, made after the lapse of twenty years, without being impressed with the conviction that the later decision is frequently and fatally in error about the *Mississippi Mills* case; about its reasoning, its holding, and its value.

We must take the liberty of reviewing that part of the opinion in the case of *Railroal Co. vs. Adams, supra,* with the hope that

we can justify and vindicate the *Mississippi Mills* case in the eyes of this court.

With that view, we invite the attention of the court to certain specific passages in the opinion quoted from above, as follows:

1.—The court says that "The case of *Mississippi Mills vs. Cook,* 56 Miss., page 40, expressly held that the legislature had no power to grant an irrepealable exemption, and under that decision the exemption claimed under this section, is manifestly unconstitutional."

The conclusion of the court is manifestly clearly erroneous. If the exemption granted came at all within the purview of the constitutional prohibition, it would not be unconstitutional *in toto,* but only the irrepealable feature of it would be so.

The constitution acting upon the statute would only avoid the statute in so far as it conflicted with the constitution; and the exemption might still stand, being repealable.

It cannot be said that because the legislature undertook to grant an irrepealable exemption its act was wholly void. The rule is well settled that a statute may be unconstitutional in part but not altogether.

"The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable so that the first may stand, though the last fall. The point is not whether they are contained in the same section; for distribution into sections is purely artificial, but whether they are essentially and necessarily connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." (Cooley's Constitutional Limitations, 6 Ed., page 211.)

We submit that if it be granted that the legislature could concede a repealable exemption limited to twenty years, the mere fact that the statute provided that the exemption should be irre-

pealable would not render the exemption void, because, if only the legislature itself sees proper to keep its hands off and not reimpose the tax, the entire scheme of exemption would be wrought out until the period limited had expired.

2.—The court further says of the *Mississippi Mills* case, on page 272, this:

"It expressly held that, while an exemption might be granted, yet it might, at any time, be repealed by the legislature, and, further, that no exemption could be granted to any private corporation for pecuniary profit by a special act extending a special exemption to that special corporation alone; but that in order to make any such exemption valid, it must be extended to all corporations for pecuniary profit of the same class, and in the same situation."

We respectfully submit that in the *Mississippi Mills* case, there was no such holding. It was not decided that no exemption could be granted to any private corporation for pecuniary profit by a special act extending a special exemption to that special corporation alone. No such decision was necessary to the case. This is manifest, for the Supreme Court of Mississippi itself, on the same page, says this:

"The Mississippi Mills did not claim that it had a valid exemption by virtue of a special act granting such special exemption to the Mississippi Mills alone, but that it had such exemption in common with all other factories similarly situated, by virtue of said general law."

If then the Mississippi Mills did not claim an exemption by virtue of a special act, how could it be that in the *Mississippi Mills* case the Supreme Court decided that no exemption granted by a special act was permitted by the constitution? In fact, the factory's act of 1872, which was under consideration in that case, was a general statute applicable to all factories similarly situated; and the Supreme Court of Mississippi itself again says in

the very decision under consideration, that, "The exemption set up here (that is by the Yazoo & Mississippi Valley Railroad, under a special charter), is wholly different. The claim here is that this particular railroad is entitled to this special exemption, which it is conceded is not now and never was extended to all other railroads similarly situated in this state."

Therefore, when the Supreme Court of Mississippi affirms that the *Mississippi Mills* case decided that a special exemption contained in a special charter was unconstitutional, that affirmation is made in the very teeth of repeated affirmations in the same paragraph of the same opinion that no such question was involved in the case.

The court seems to have misapprehended some observations of Simrall, C. J., who delivered the opinion, where he said:

"The 13th section contains no idea of hostility or repression towards corporations for profit. It gives no hint of a policy of discouragement; it contains no rebuke of legislation which pretermits from taxation the corporate property of *an association struggling into existence.* And if the legislature should determine that it was wise and for the general good to pretermit the taxation of all property employed in the manufacture of cotton and woolen cloths or agricultural implements, or household furniture, as a means to encourage investments in these enterprises, there is nothing in the 13th section, or combined with the 20th, which would prevent it. The exemption would be on account of the nature of the property and the use to which it is put. * * * In such cases, in selecting the subject of taxation, it passes by those sorts of property, or property put to a particular use. But distinction in the selection of the subjects cannot be made *because the property belongs to a corporation or individuals,* nor because the owners are poor or wealthy. If the exemption is because of the use, as in manufacturing, it must extend to the like property of individuals. * * * If taxes are imposed on manufacturing property (for illustration) owned by individuals, the like tax shall be paid by corporations; but if the legislature, from considerations of policy, exempts property because of its use and the purpose for which it is employed, the

exemption cannot be given to the corporation as owner, whilst the individual owner is required to pay the tax. That would not be equal or uniform."

Therefore, what Judge Simrall was saying was, not that the legislature could not grant an exemption from taxation in a particular charter, because such grant would not extend to all charters of a similar sort; but his proposition was that if the legislature selected for taxation a certain class of property, it would be unconstitutional for it to tax such property belonging to individuals, and, at the same time, exempt similar property, similarly situated, belonging to corporations, *because* it belonged to corporations. So long as the exemption, according to Judge Simrall's view, was because of the nature of the property and was not with reference to the ownership of the same, the constitution had no prohibition. Wherefore, it seems plain that before an exemption of railroad property, the property of a corporation, can be held to be unconstitutional, it must appear, first, that the exemption was in fact a discrimination against similar railroad property similarly situated belonging to individuals.

3.—The court further says of the *Mississippi Mills* case, that—

"One of the vices of the decision in *Mississippi Mills vs. Cook,* is that it did not hold that all the property of private corporations for pecuniary profit was required to be taxed by the terms of the constitution, Sections 13 and 20, Article XII., just as and when the property of individuals was. Instead of doing this, the court decided that all such property was free from taxation, unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the constitution. It was certainly an idle performance to declare, as the court did declare, that the whole effect of the constitutional provision was to render the property of private corporations, for pecuniary profit, liable to taxation; that everybody knew, and to so limit the constitutional declaration, was to emasculate it."

Now, the court is wholly in error in stating that the *Mississippi Mills* case decided that such property was free from taxation unless the legislature expressly subjected it to taxation. There is no such decision in that case. What the court held was simply this: That because of the constitutional provision it was no longer competent for the legislature to grant an irrepealable exemption to corporations.

Neither did the *Mississippi Mills* case indulge in the "idle performance" of declaring that "the whole effect of the constitutional provision was to render the property of private corporations for pecuniary profit liable to taxation."

Judge Campbell's first proposition in the leading opinion in the case (56 Miss., page 51), was this:

"It was not intended by Section 13 to confer power on the legislature to tax the property of corporations of the class mentioned. That existed, without this section, as an inherent legislative power."

As repeatedly stated already, the decision was that the effect of the constitutional provision was not to take away from the legislature the power to grant an exemption, but was to take away the power to make an exemption irrepealable.

As elsewhere shown in this brief, the decision in that case *should* have been that the section was intended to settle a rule of taxation about which there was then a doubt: not to "*render* the property of private corporations for pecuniary profit liable to taxation," but to declare that it was so liable notwithstanding the mere fact of its incorporation—a fact which everybody at that time did not know, nor it seems even the Supreme courts in New England.

Moreover, the Supreme Court of Mississippi in the decision of *Railroad Co. vs. Adams,* 77 Miss., draws erroneous and unwarranted inferences from its own interpretation of the constitution. On page 274, it says:

"Sec. 13 of Art. XII. was put in the organic law of the land beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private corporations for pecuniary profit. * * * This is the doctrine announced by Cooley and Story, and our construction of the meaning of Section 13, to-wit: that it required the property of private corporations for pecuniary profit to be taxed just as—'the same as'—the property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the Supreme Court of the United States, and the Supreme Courts of Alabama, Arkansas, California, Florida and Iowa. We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question and overrule *Mississippi Mills vs. Cook,* in so far as it held that the property of private corporations for pecuniary profit was not, by the constitution of 1869, Sections 13 and 20 of Article XII., expressly directed to be taxed just as the property of individuals."

From this premise, that the constitution meant that the property of corporations for profits should be taxed "just as" the property of individuals was taxed, the court deduces the conclusion that a charter granting an exemption to a private corporation was unconstitutional *because* it was granted in a special charter. There is no doubt about the position; it is clearly defined by the court itself in the case of *The Tombigbee Mills vs. Wirt Adams, Rev. Agent.,* later decided, Southern Reporter, Vol. 29, p. 470.

The conclusion is wholly erroneous, for the reason that it nowhere appears, nor is it a fact, that there is any railroad property in the state of Mississippi owned by private individuals and subjected to taxation.

The idea advanced by the court here was the idea of Judge Chalmers, who delivered the dissenting opinion in the *Mississippi Mills* case, with this difference: Judge Chalmers, because

he held that such was the true meaning of the constitutional provision, deduced the conclusion that "there is no violation of the constitution until some law has been enacted in regard to 'corporate property' which would be invalid if applied to individual property."

He said, "Alike they may be made the subject of a contract of exemption which, when made, shall be irrepealable;" also that while the framers of our constitution "desired unmistakably to place individual and corporate property on the same footing as to taxation, they do not propose in any manner to interfere with that inherent legislative right to contract away the taxing power which the Supreme Court of the United States had for years before the making of our constitution repeatedly declared to exist, except where denied by the organic law."

It is difficult to see how from a constitutional provision which "required the property of private corporations for pecuniary profit to be taxed just as—'the same as'—the property of individuals, so that one would not be exempt and the other taxed," the conclusion can be drawn that the legislature may not grant an exemption to a particular corporation, while it remains unquestioned that it may grant an exemption to a particular individual. No one has yet questioned that under the constitution of 1869, the legislature could have granted a special contract exemption to a natural person. *Judge Chalmers,* on page 68, in his dissenting opinion in the *Mississippi Mills* case says: "My colleagues concede this. They admit that there is nothing in the constitution to prohibit an irrepealable exemption, by contract, of the property of individuals." And the Supreme Court of the United States has said, in *Minot vs. Phil., etc., R. R. Co.,* 18 Wal. 206, that—

"It has also been repeatedly held by this court that the legislature of a state may exempt *particular parcels of property* or the property of *particular persons or corporations* from taxation, either for a special period or perpetually," etc.

And the present Supreme Court of Mississippi, in the *Tombigbee Mills* case cited above, which was decided so late as February 18, 1901, expressly declared that it was not the effect of the constitution of 1869 to prohibit exemptions of property, or even of corporate property; but only to regulate the *mode* of the grant.

How, then, can it be possible that, while the *purpose* of the provision is to require them to be taxed "just alike," as Judge Whitfield, in his opinion, declares it was, yet the *effect* of it is to take away the power to grant even a repealable and temporary exemption to a particular corporation, but leave untouched the power to grant even an irrepealable and perpetual exemption to a particular individual? The conclusion, not only does not follow, but it is even contradictory to the purpose so declared; contradictory because corporations and individuals are not thereby made alike in this matter under the constitution, but corporations are, by such a construction, actually discriminated against.

What then was the true meaning of Section 13, Article XII., of the constitution of 1869? It was exactly what the language of the sentence most naturally imports. The trouble has arisen in an effort to construe what, in fact, but little needed construction. As already pointed out in this brief, the true intent was to provide that notwithstanding the grant of the charter of incorporation to a company whose property should be affected by a public use, such grant should not of itself carry an exemption from liability to the ordinary tax burdens of the general mass of property; but that the property of the company so incorporated for pecuniary profits should be subject to taxation just as the property of individuals was so subject.

It was only by virtue of a charter, which charter was a contract between the artificial person created and the state, that such artificial person could come into being at all. The very birth of such an artificial being was in and by a contract. This was not true in respect to the natural person, that is to say, the "individual."

Wherefore, since the existence of a corporation came through a contract which was protected by the constitution of the United State from impairment, and since there was in the United States a widely disseminated idea (which idea as already pointed out, had received frequent recognition in the legislation of Mississippi) that the bare creation of such a corporation carried, by implication, an exemption from ordinary taxation, but since no such exemption could possibly be implied in and from the bare existence of an individual—the true intent of the constitution was to settle that question, and put the two classes of beings, as to their property, on precisely the same plane.

It is a curious thing that in the three concurring opinions delivered by our Supreme Court in the *Mississippi Mills* case, and in the later opinion delivered by our Supreme Court in 77 Miss., the true meaning of the constitution of 1869, which lies so apparent on the face of the legislative history of the state, should never have been fully gathered. If the court will read the dissenting opinion of Judge Chalmers in the *Mississippi Mills* case, it will be seen that that able jurist was very near to the true solution of this provision, but he did not quite reach it, and, as pointed out above, Judge Whitfield in his opinion in 77 Mississippi states with great emphasis and clearness what the true intent of the provision was, but he deduces, we respectfully submit, a most indefensible and erroneous conclusion.

The foregoing construction of the constitutional provision is the only one which gives any proper efficacy to the concluding words of the sentence. In fact, it is the only one which does not virtually eliminate the concluding words from the provision.

Judge Campbell, in his opinion in the *Mississippi Mills* case, held that the provision was intended to take away from the legislature the power to grant to a corporation an irrepealable exemption, while leaving untouched the power to grant one which was repealable; but this view gives no force whatever to the words "the same as that of individuals." It ignores the clause of

the section which is manifestly intended to be a measure or standard of the extent to which the property of corporations shall be subject; yet Judge Campbell, in his opinion, came very near to the true solution, as is clearly shown on page 52, of 56 Mississippi, where he says:

"The language is not, shall be subject to the same *taxation*, but to 'taxation the same as,' etc. If the language as used is equivalent to 'the same taxation as that of individuals,' it must nevertheless be held that its object and effect were to fix the sort of taxation to which the property of all corporations should be subject, and not to affect the condition of being subject to taxation. The peculiar arrangement of the words 'the same as' suggests as possibly within the contemplation of the framers of the constitution this view, viz: The property of all corporations for pecuniary profit shall be subject to taxation, just as the property of individuals is. That of individuals is liable to taxation. They have not been granted immunity from taxation. Their property is subject to taxation, and so, in like manner, the property of all corporations for pecuniary profit shall be liable to taxation."

But Judge Campbell failed to follow out his accurate and nice analysis of this language to its proper conclusion. Prior to the constitution of 1869, unquestionably the authority of the legislature to grant an exemption, either generally as to classes of property, or specially to natural persons or corporations, was unquestioned, and is unquestionable. How could it be possible, then, to deduce from a declaration that the property of corporations should be subject to taxation the same as that of individuals, a conclusion that the legislature was forbidden to grant an exemption to corporations, as long as it retained the power to grant an exemption to an individual? Yet, manifestly, there is in the constitution of 1869 no prohibition of the pre-existent sovereign right to make an exemption contract irrepealable in its nature with a natural person.

Here is where Judge Simrall erred. In his construction of those words, in his concurring opinion, on page 62, he says:

"That purpose is, the very important mandate that the property of corporations for gain shall *be subject* to taxation like that of individuals. It is mandatory in this: That nothing shall be done, or can be done, which shall withdraw it from perpetual liability to taxation."

The error of Judge Simrall consisted in not seeing, as stated above, that a declaration that the property shall be subject to taxation like that of individuals, did not amount to a prohibition or exemption of corporate property until there was some restriction in the constitution against the exemption of individual property.

This is the express declaration of Judge Chalmers in his dissenting opinion, on page 70. There he says:

"It shall 'be subject to taxation the same as that of individuals.' How is that of individuals subject? In subordination to the legislative right to exempt by contract. So, therefore, all corporate property must be subject also in subordination to the right of exemption by contract or charter."

Judge Chalmers, therefore, saw the true meaning of this constitutional provision, but he failed to re-enforce his argument by the proper setting of the provision in its legislative history and in its judicial reason.

The opinion, on the other hand, of Judge Whitfield in 77 Mississippi, as pointed out above, fails to give any force whatever to these words. Indeed, as also pointed out, his conclusion that the constitution prohibited the grant of either repealable or irrepealable exemptions in a special charter necessarily draws a discrimination between the subjection of corporate property to taxation and that of individuals, and leaves the legislature with the power to exempt in one case but not in the other. Whereas, as he himself declares, the mandate of the constitution, plainly, is that the two conditions shall be the same.

The case of *Y. & M. V. R. R. Co. vs. Wirt Adams,* 77 Miss., is not the last decision of our Supreme Court on the question involved in this case. On the 18th of February, 1901, it decided the case of *Adams, Revenue Agent, vs. Tombigbee Mills,* reported in 29 Fed. Rep., page 470. The question was as to the constitutionality, under the constitution of 1869, of the law of 1882, page 84, which exempted from taxation all manufacturing plants for a period of ten years from the time when the factory should be completed. The court sustained the validity of the act, holding expressly that the constitution of 1869 did not require all property to be taxed, but only prohibited exemptions by special acts; exemptions extending to all property of a similar nature, whether owned by corporations or individuals could still be granted.

Under that decision, in other words, had the exemption or appropriation in suit been applicable to all railroads, it would have been valid; but it becomes invalid because it is a special act limited to one railroad. The position evidently is that the greater power to exempt all railroads does not include the lesser power to exempt any particular railroad. No such distinction, it is submitted, finds authority in the constitution of 1869 or any reason in the nature of the subject matter. The constitution warrants no such classification. What provision of the constitution of 1869 declared that the legislature might exempt cotton factories, but could not exempt railroads? What provision of that instrument declared that railroads could be exempted as a class, but could not be exempted in particular cases? Concede the power to exempt at all—cotton factories or railroads whether belonging to corporations or individuals—and it logically follows that any railroad may be exempted if the public good so requires. The argument in support of the power to exempt mills and factories, but not to exempt a railroad unless all railroad property were included, would reduce the constitutional rule to a mere question of method. Railroads are never identical in situ-

ation, character, route or terminus. Each railroad is *sui generis*. Each touches different points of country, is built under different conditions, tends to foster and develop different interests. It would be manifestly unsound to affirm that all railroads sustain the same relations to the public wants, or must or can be grouped as one in that respect. It should indeed require very plain language in a constitution to evidence an intention to permit an exemption of *all* railroads, but to prohibit an exemption of any one, no matter how differently situated from the other railroads of the state. Yet such an extreme and practically illogical result is what the opinion in the *Tombigbee Mills* case would seem to indicate.

The Mississippi court, in sustaining the exemption involved in the *Tombigbee Mills* case, speaks of the "furtherance of a great and just public policy, always cherished in this state, namely, the establishment of cotton factories." But this is a relatively small consideration when compared with the overshadowing necessity of securing the construction of railroads, which was then impossible without outside capital. Without the railroads, the benefit to be derived from the establishment of the factories would be minimized. The act involved in the *Tombigbee Mills* case was passed in 1882, the same year in which the charter here involved was granted, and after the passage of laws under the constitution of 1869, providing for exemption or commutation of taxes in respect of at least forty-five railroads. The state desired to accomplish the necessary railroad construction without taxing the community. The legislature proposed to capitalists and contractors and material-men and all others who might assist in the construction of the road and receive in return the company's promise of payment that, to the extent of the taxes receivable from the new property created with their funds, it would forego or exempt; provided, in some cases, that those taxes were applied to the payment of debts. It was on the faith of this promise not only that the railroad corporation itself undertook

the construction of the road and invested its capital, but that its creditors risked their funds, their materials and their labor, and it is simply common justice, as it is to the true interests of the state itself, to perform the obligation in good faith. No state has ever profited by a failure to keep strictly its plighted faith. As Mr. Justice Field said, in *Hartman vs. Greenhow,* 102 U. S. 672, 682:

"There is no wealth or power equal to that which ultimately comes to a state when in all her engagements she keeps her faith unbroken."

Not only so; as indicated before in this brief, the legislature and other authorities of Mississippi had submitted to the Congress of the United States the memorial of 1882 in which the renewal of the land-grant made by the United States was prayed for, on the ground, amongst others, that "at its present session, our legislature has granted a new act of incorporation with liberal provisions, thus again attesting the abiding and earnest interest felt by our people in this important work." Amongst the "liberal provisions" contained in such new charter was Section 18, which contained the exemption now sought to be avoided. On this memorial was obtained the renewal of the land-grant by the act of Congress of 1890. Is there not an executed contract here, between the state and the United States?

Stearns vs. Minnesota, U. S. Sup. Ct., decided December 3d, 1900.

We do not overlook the fact that the Supreme Court of Mississippi in its opinion in *Railroad Company vs. Adams,* 77 Miss., while treating the question now under consideration, claimed, on pages 274-275, to be sustained in its view by the following decisions of this court and of the state courts: *Louisville, etc., Railroad Co. vs. Palmes,* 109 U. S. 248; *St. Louis, etc., R. R. Co. vs. Berry,* 113 U. S. 475; *Schurz vs. Cook,* 148 U. S. 408; *Keokuk, etc., R. R. Co. vs. Missouri,* 152 U. S. 303, 310-312;

City of Davenport vs. C. R. J. & C. R. R. Co., 38 Iowa, 633; *The People vs. McCreery,* 34 Calif. 432; *Fletcher vs. Oliver,* 25 Ark. 289; *Palmes vs. L. & N. Railroad,* 19 Fla. 231; and *Mobile vs. Stonewall,* 53 Ala. 570.

An examination of these cases will, however, show that they are no authority for the decision rendered.

The Iowa constitution contained the following provisions:

"Art. 1, Sec. 6.—All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

"Article 8, Sec. 1.—No corporation shall be created by special laws; but the General Assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

"Article 8, Sec. 2.—The property of all corporations for pecuniary profit, shall be subject to taxation the same as that of individuals."

Thus, it will be seen that no corporation could be created by a special law, but could only be organized under general laws; and also, it was provided that all laws of a general nature should have a uniform operation; and the legislature was expressly prohibited to grant to any citizen or class of citizens any special privileges or immunities. Under that constitution it would have been no more competent for the legislature to grant an exemption to an individual than to a corporation. There were no provisions in the constitution of Mississippi imposing these restrictions or anything like them; and the Supreme Court of Iowa, while construing Article 8, Section 2, of its constitution, manifestly did so in the light of the other provisions in the same constitution, although the opinion of the court is not fully reasoned out.

The Alabama case arose under a very different statute. The law assailed therein was one which restricted the power of towns

to impose taxes on corporations for profits at a higher rate than sixty cents on one hundred dollars of capital stock. It was not a question of exemption, but a question of discrimination in rate of taxation on property selected as the subject of taxation.

The constitution contained the following provisions:

"Art. IX., Sec. 1.—All taxes levied on property in this state, shall be assessed in exact proportion to the value of such property."

"Art. XIII, Sec. 1.—Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section, may be altered, amended or repealed."

"Art. XIII, Sec. 4.—The property of corporations now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals, except corporations for educational and charitable purposes."

The construction given by Judge Brickell to Art. 13, Sec. 4, was avowedly placed by him on the fact that the same constitution included Article 13, Section 1, and such construction was necessary in order to give it any operation at all.

We quote herein a passage from Judge Brickell's opinion.

The court will see that the Supreme Court of Mississippi, in quoting from that opinion (on page 276), omits to quote the portion of the opinion which we herein give in brackets.

"The argument of appellee, that it was intended only to reserve to the legislature the power of subjecting all corporate property to taxation imposed on individuals, and to avoid the introduction into charters of irrepealable exemptions, or discriminations, cannot be supported. [That purpose was fully accomplished by the first section of this article of the constitution. That section is of itself a full reservation of legislative power, and an ample guaranty against irrepealable exemptions or discriminations, etc., etc. The fourth section was therefore added, in itself self-executing, without the aid, in fact in restraint, of legislative power, subjecting corporate property to the taxation

imposed on individuals. If this is not the effect of that section, it has no office to perform, and is without significance. All it can accomplish would have been accomplished by the first section.] Reading these constitutional provisions in the light of their history, and with due regard to the words in which they are expressed, it is impossible for us to doubt that it was competent for the General Assembly in the imposition of taxes to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen."

Thus, the Alabama decision instead of being an authority for the Mississippi decision, is an authority against it. Consistently with the Alabama decision, it would be impossible to reach the conclusion announced by Judge Whitfield that this clause prevents an exemption in favor of corporations, so long as it is not denied that the legislature may grant exemptions in favor of individuals. The case actually before the court, however, as pointed out above, was not only of exemption, but of a discriminating rate.

The California case did not touch this clause of our constitution in any way. It was a decision upon the equality and uniformity clause; and the conclusion announced by the court as to the meaning of that clause, is in direct conflict with all the Mississippi cases on the same clause from the beginning to the present date, and is in direct conflict with the decision of the Mississippi Supreme Court in the *Tombigbee Mills* case, announced in February, 1901.

The case of *Schurz vs. Cook,* 148 U. S. 408, does not touch this question at all.

The case of *Louisville vs. Palmes*, 19 Fla. 231, and 109 U. S. 248, arose under a constitutional provision as follows:

"The property of *all* corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be held and used exclusively for religious, educational or charitable purposes."

It will be observed that this provision contained the word "all;" and did not contain the words "the same as that of individuals," which are contained in the Mississippi constitution. Thus, was omitted from that provision the very measure or standard of the extent to which the property was by the constitution to be subject to taxation.

We have previously argued that these words in the Mississippi constitution can not be ignored. But in the Florida constitution, they were wholly omitted, and the word "all" is inserted.

It is also to be noted that in the cases arising thereon, no question was made as to the meaning of the clause. This court said in their opinion that:

> "It can not be, and is not contended, that, under these constitutional limitations, the legislature of Florida could make an original grant to a railroad corporation exempting its railroad from taxation."

It is to be observed, furthermore, that in making such announcement, the court expressly alludes to Article XI., Section I., of the Florida Constitution, which is as follows:

> "The legislature shall provide for uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of *all* property, both real and personal, excepting such property as may be exempt by law for municipal, educational, literary, scientific, religious, or charitable purposes."

In the Mississippi constitution, there was no such provision. The enumeration of the purposes for which under the Florida

constitution an exemption might be granted, was a clear exclusion of any other purpose, under the rule *mentio unius exclusio alterius est.*

The case of *St. Louis, etc., R. R. Co. vs. Berry,* 113 U. S. 475, was decided under the constitution of Arkansas, which, just like that of Iowa, set forth above, contained the following provisions:

> "The General Assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws, but all such laws may from time to time be altered or repealed." Article 5, Section 48.
>
> "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Article I., Section 18.
>
> "The property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals." Article 5, Section 48.

And the same observations made in respect to the Iowa constitution and decision apply here.

The case of *Keokuk, etc., R. R. vs. Missouri,* 152 U. S. 303, originated under the Missouri constitution, which contained the following:

> "Article XI., Section 16.—No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state."

Thus, it will be seen that here was an express prohibition of any exemptions, and the clause under consideration was in no particular like that in the constitution of Mississippi. We take it that the only reason why this case was cited in the opinion of the Supreme Court of Mississippi, was that in the opinion of this court the previous decision in 113 U. S. was cited *arguendo.*

3.—The Constitutionality of the Act of 1882 as to Privilege Taxes.

Even if it be conceded that the constitution of 1869 deprived the legislature of the power to grant an exemption of corporate *property* under any conditions, and that the act of 1882 is subject to that prohibition; yet still this decision of the Supreme Court of Mississippi must be reversed.

The original bill shows that the tax collector was demanding of plaintiff a privilege tax as well as an *ad valorem* property tax (Record, page 3). And the demurrer to this bill was sustained.

Section 18 of the company's charter, quoted above, exempted from taxation "said company, its stock, its railroads and appurtenances, and all its property in this state," etc.

Here is a clear exemption from privilege taxation as well as from *ad valorem* taxes.

Grand Gulf, etc., R. R. vs. Buck, 53 Miss. 246.

The distinction between privilege taxes and *ad valorem* taxes on property is elementary; and, moreover, has been thoroughly well recognized and settled in Mississippi.

Vicksburg Bank vs. Worrell, 67 Miss. 47.

The prohibition contained in Section 13, Art. XII. of the constitution of 1869, is by its very terms limited to property tax. "The *property* of corporations for pecuniary profits shall be taxed," etc. So runs the section. It seems clear that from this provision no prohibition to the legislature to deal with the matter of privilege taxation can be inferred. The selection of the subjects of taxation by the legislature is an exercise of the sovereign power of the state; and it will not be denied to the legislature in so remote and oblique a manner as must be adopted in order to work out a prohibition against privilege taxes by a prohibition which in its terms is restricted to property tax.

It seems clear that so far as privilege taxation is concerned, even under the constitution of 1869, the matter was entirely

subject to the legislative will, and to that extent the exemption granted in 1882 was clearly constitutional.

4.—The Effect of Section 181 of the Constitution of 1890.

The constitution of 1890 was adopted Nov. 1st, 1890, nearly eight years before the decision by the Mississippi Supreme Court of the case of *Adams vs. Yazoo & Miss. Valley Railroad.* The *Mississippi Mills* case had been standing unchallenged, and received as the accepted law of the state, for more than twelve years when the new constitution was adopted. It had been followed by *McCulloch vs. Stone,* 64 Miss. 378, decided in 1886; by *Yazoo R. R. Co. vs. Thomas,* 55 Miss. 553, decided in 1888; by *Vicksburg Bank vs. Worrell,* 67 Miss. 47, decided in 1889; and by *Attala County vs. Kelly,* 68 Miss. 40, decided at the October term, 1890; and the adoption of the constitution was closely followed by the decision in *Railroad Co. vs. Taylor,* 68 Miss. 361, decided Jan. 26, 1891.

In view of these decisions, and of the legislative history germane to this subject, there can be no reasonable doubt as to what was the common understanding of the framers of the constitution on the subject, or as to what was their intention in the provisions which were inserted into the new constitution.

Adams, Revenue Agent, vs. Bank, 29 Southern Rep., 402, decided Jan. 28, 1901.

Section 13, Article XII., of the constitution of 1869, provided that "The property of all private corporations, for pecuniary profits, shall be subject to taxation the same as that of individuals"; and the Supreme Court of Mississippi had been for twelve years holding that such provision did not take away from the legislature the power of granting an exemption.

The Constitutional Convention of 1890 enacted Section 181, which provided that "The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same

extent as the property of individuals, but the legislature may provide," etc.

Thus, by striking out from the previous constitutional provision the words "shall be subject to taxation the same as," and inserting in lieu thereof the words "shall be taxed in the same way and to the same extent as"—there was a clear intendment to meet the *Mississippi Mills* case and its following cases, and change the rule thereby established. But that same section (181) contained the following sentence:

> "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

This constitutional enactment validates the charter of 1882, even if it be conceded or determined that such charter as originally granted was violative of Section 13, Article XII. of the constitution of 1869.

It is clear that this provision was intended to apply to and preserve exemptions, such as that involved in the case at bar, from the fact that except in the case of two or three small private schools, altogether insignificant in the fiscal system of the state, there were in 1890 no corporations for profits entitled to exemptions which had been granted prior to 1869.

Exemptions had been commonly granted before that time, but they had either never been availed of, or had terminated by expiration of the period for which they were granted, or had lapsed for some other cause. The exemption of the Mobile & Ohio Railroad Company had been surrendered in 1882 in consideration of a release by the state of a debt due from the company (Appendix Senate Journal, 1882, Governor Lowry's Message). Practically all corporate exemptions, therefore, such as are mentioned in section 181 of the new constitution, must necessarily have

been granted under the constitution of 1869; and these were the exemptions which the framers of the constitution of 1890 had in mind, and which they intended in good faith to protect.

These considerations were submitted to this court at the October term, 1899, in the brief filed on behalf of plaintiffs in error in the case of *Y. & M. V. R. R. Co. vs. Wirt Adams, State Revenue Agent,* No. 324; and in that case the same counsel appeared before this court who appear in this; yet, notwithstanding, it has never yet been pointed out to this court, so far as we are aware, to what exemptions the saving sentence in Section 181 is applicable, unless it be applicable to those exemptions now under consideration by this court. There has been a complete failure to advise this court on that point; and it is plain that unless that sentence in Section 181 be applied to this exemption and one or two similar exemptions claimed by litigants recently before this court, and soon to be here again, that sentence is made void and of no effect.

In *State vs. Luther,* 56 Minn. 156, 164, it appeared that after a continuous course of legislation in respect to commuted taxation upon corporations, which was said to amount to "a legislative construction of the constitution, which of itself would be entitled to great weight," a constitutional amendment was adopted requiring the submission of any proposed statute providing for the repeal of a law respecting commuted taxation to a vote by the people. Mitchell, J., said:

> "This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future. If it did not refer to this, there was nothing to which it could refer. It is, by necessary implication, a validation of past legislation of that kind, and a grant of power to enact it in the future."

In the case of *Stearns vs. Minnesota,* decided by this court on the 3rd day of December, 1900, the decision in *State vs. Luther* was cited, and its reasoning and judgment were adopted and approved; and this court, on writ of error from the Supreme Court of Minnesota, held that a certain statute of that state granting a commutation, conceding the same to have been violative of the constitution of 1858, and void, was nevertheless validated and made good by constitutional amendment of the year 1871.

In that case such validation was effected merely by a constitutional provision that statutes thereafter passed to repeal such laws should be passed in a certain manner. And it might very well have been argued that the constitutional provision only meant that statutes passed to repeal valid constitutional laws, should be passed in a certain manner; but it was not so held, either by the state court or by this court. That court and this court looked through all mere quibbling as to whether an unconstitutional law was a law, and adopted and enforced what was in fact the plain intention of the framers of the constitution.

We submit that this court will adopt the same course in the case at bar.

The legality of exemptions in Mississippi under the constitution of 1869 had been declared and upheld prior to 1890 by at least four decisions of the highest tribunal of the state. The constitution of 1890, therefore, referred to a class of exemptions sanctioned by the legislative practice of many years under the constitution in force, permitted by the universally accepted construction of that constitution, and confirmed and declared by the highest state court. These were the exemptions "to which corporations are legally entitled." The language of Section 181 fairly applies to no other subject matter.

No more persuasive union of all canons of constitutional construction and interpretation can well be imagined than are found in this case as to the legislative power to grant exemptions,

namely (1) a common course of legislation evincing the universally entertained view of corporate liability to taxation, and recognizing the necessity for providing that corporations should be "subject to taxation," which view continued for many years; (2) the adoption of that view of liability to taxation in the constitution of 1869; (3) a judicial inquiry into the validity of claims for exemption, and a judicial declaration of their validity; (4) common and long continued legislative recognition, under the constitution of 1869, of the legality of the exemptions, and repeated refusals by the legislature to repeal such exemptions; (5) continuous acquiescence by the executive department and by those charged with the collection of taxes; and (6) a subsequent constitution, dealing with existing exemptions necessarily created under the constitution of 1869, and confirming those to which corporations were "legally entitled." In truth, the convention which adopted the constitution of 1890 could not have indicated more plainly that it meant to confirm and continue such exemptions as that claimed by this plaintiff in error if it had specifically named and included them in that instrument.

Nor would this court in adopting such view, come into conflict with the decision of the Supreme Court of the state in the case of *Adams vs. Railroad Co.*, 77 Miss. 194. In that case the subject which we are now treating was considered by the court in its opinion, on page 254. The court says:

> "Learned counsel for the railroad companies insist that under Sec. 181 of the constitution, and Sec. 279, in the schedule of the constitution, this exemption was continued. ..... This is a wholly mistaken view of these provisions of the constitution: Sec. 181 preserves only such exemptions as corporations fully organized prior to the constitution were legally entitled to at the adoption of the constitution. Its meaning plainly was that if corporations organized and existing at the date of the adoption of the constitution should retain the precise corporate existence they then had, such exemptions as they legally had should con-

tinue whilst their corporate organizations remained as they were. It has nothing to do with the preservation of exemption to any corporation existing at the date of the adoption of the constitution, which ceased to retain its said precise corporate existence, and became consolidated with another corporation, thereby ceasing to exist. Sec. 279 meant the same thing, to-wit: that charters of incorporation belonging to corporations at the date of the adoption of the constitution were not, in any way, to be infringed by the constitution so long as such corporations retained their precise previous corporate organization. This, and this only, is the whole scope of the two sections. Their plain meaning is in harmony with the whole spirit of the chapter on corporations in the constitution, and cannot be frittered or pared away by ingenuity or refinement."

Thus it will be seen that the Mississippi court refused to allow a ratification by Section 181 on the ground, and on the ground only, that the railroad company then before it had originated, by the consolidation of 1892, and after the constitution of 1890 became operative; and that it was not intended by Section 181 to do anything more than to preserve the exemptions to corporations existing at the time.

This reasoning, of course, has no application in a case like the one at bar where the corporation was in existence when the constitution of 1890 was adopted, and continued in existence thereafter, and until now "retaining the precise corporate existence it originally had."

In *Wirt Adams, State Rev. Agent, vs. Tombigbee Mills,* 29 Southern Reporter, decided Feb. 18, 1901, the Mississippi Supreme Court itself says:

"This appellant never lost its exemption by consolidating with any other corporation. It has always retained 'the precise corporate existence' it originally had. *Its exemption was therefore continued by Section 181 of the constitution of 1890,* subject to legislative repeal."

However, even if it were necessary to come in conflict on this point with the Supreme Court of Mississippi, we should still insist that the view which we have submitted is the correct one, and should invoke the settled principle that in a case like this, this court will determine these questions upon its own judgment of the law.

5.—The Impairment of the Exemption by Subsequent Legislation.

In the discussion of this title, there are several theories to be considered, which flow from the preceding matter.

1. If we are correct in the proposition that the exemption found its origin in the act of 1854, and that the act of 1882 was merely a modification of it, admissible under the constitution of 1869 (even as recently construed by the Supreme Court of Mississippi) as argued herein, *ante* pp. 22-26,—then it is immaterial if the Supreme Court of Mississippi be correct in holding that the act of 1886, and the Code of 1892, either of them, assumed to *repeal* the exemption. Such repeal was beyond the power of the legislature.

2. Again: If we are correct in the proposition that both the *Mississippi Mills* case and the *Adams* case missed the true meaning of the constitution of 1869, and that that constitution did not prohibit the granting to a railroad thereafter to be constructed even an irrepealable exemption from taxation, as argued herein, *ante* p. 26, then also is it immaterial if the Supreme Court of Mississippi correctly construed the act of 1886 and the Code of 1892; and for the same reason.

3. Again: If we are correct in the proposition that the constitution of 1869 contained at least no prohibition against the granting of a perpetual exemption from *privilege* taxes, as argued herein, *ante* p. 52; then, so far as the privilege taxes involved are concerned it is still immaterial if the Supreme Court correctly construed the act of 1886 and the Code of 1892, and

for the same reason—though it is material so far as the property taxes are concerned.

4. If, however, this court should determine, either (a) that the construction given to the constitution of 1869 in the *Mississippi Mills* case is correct; or (b) that the rights of plaintiff in error must be determined on the principle of that case, because it was the construction of the constitution settled by the Supreme Court at the time when the railroad company acted, or (c) that the effect of Sec. 181 of the constitution of 1890 was to ratify the grant of exemption made in 1882 even if unconstitutional at the first—then in any of those events, the question arises: Has the exemption been repealed, as the Supreme Court of Mississippi held that it has been?

We maintain that it has not; that in none of the acts passed since 1882 has the legislature intended to revoke this grant.

It is useless to discuss the true meaning of the Code of 1880, since it was enacted two years before this grant was made.

The act of 1884 certainly is no repeal (See Laws 1884, page 29; Appendix, pages 25 and 26). That statute was but an amendment of sections 607 and 608 of the Code of 1880. All discussion as to the intendment is cut off by its own express provision, when, after fixing the privilege tax which might be paid by the various railroads named, it declares this:

> "All the railroads not named herein, *and not exempt from taxation by their charters,* $60.00 per mile."

The Supreme Court of Mississippi, in the case of *Adams vs. Railroad Company,* 77 Mississippi, in its opinion treating this subject of repeal, on pages 290-292, does not even claim that the act of 1884 operated as a repeal.

Section 6 of Chapter 1 of the acts of 1886 (Laws 1886, page 23; Appendix, page 27), is claimed as a repealing act; and, as applied to the Natchez, Jackson & Columbus Railroad, was so treated by the Supreme Court of Mississippi in the *Adams* case. We should challenge, if it were necessary, the correctness

of the analysis of that statute made by the Supreme Court of Mississippi as applied to any railroad, claiming that it was not the intention of the legislature thereby to *impose* taxes on any railroad whatever; but certainly it can not be so applied to the Gulf & Ship Island Railroad. The section runs as follows:

> "SEC. 6.—*Be it further enacted,* That the act entitled 'An Act to amend Sections 607 and 608 of the Code of 1880, in relation to privilege taxes on railroads, approved March 13, 1884, be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums twenty-five *per centum* greater respectively than the sums mentioned in said act; and hereafter said railroad companies shall pay privilege taxes respectively twenty-five *per centum* greater per mile than as fixed in said act."

But one construction can be placed on this statute, *i. e.* that it increased by twenty-five per cent. the rate of taxation on all roads which were taxable under the act of 1884. It did not seek to subject any property which had been theretofore exempt, and its operation was expressly confined to the "several railroad companies mentioned and referred to in said act"; (*i. e.*, the act of 1884) manifestly meaning those that were referred to for purposes of taxation, and having no relation whatever to those that were excused because of their charter exemptions.

The act of 1888, page 29, cited by Judge Whitfield in his opinion on the *Adams* case, 77 Miss., page 289, certainly imposed no tax on anything. It runs in this wise:

> "SEC. 1.—*Be it enacted by the Legislature of the State of Mississippi,* That every railroad which has failed to pay the taxes for which the same was liable for any year for which it was so liable, *such railroad not being exempt by law or its charter from taxation for such year and so being liable to taxation,* shall be assessed for, and shall pay, an *ad valorem* tax, to be assessed as hereinafter provided, unless," etc.

This statute, therefore, was nothing but a statute providing

for the collection of delinquent taxes; and extending to the delinquents the privilege of paying a commuted privilege tax instead of submitting to *ad valorem* taxation.

The act of 1890 (Laws 1890, page 12; Appendix, page 30), did not impose taxes on railroads theretofore exempt. Such result was expressly negatived by its proviso, which is as follows:

> "Provided no railroad shall be subject to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed:" etc.

This statute is a little awkwardly written; but the limitation of the exemption to three years from the date the rails are first laid, is manifestly not a limitation of the exemption contained in any *charter,* but is a limitation of the new exemption which is granted by the act itself to railroads not theretofore exempt; for the act grants an exemption to all railroads in process of construction, whether they were theretofore exempted or not.

The court will observe that the Supreme Court of Mississippi in its opinion (77 Miss. 291) does not even claim that the act of 1890 repealed any exemption theretofore existing; it only claims that it was a *fiasco,* and did not continue the exemption of the Natchez, Jackson & Columbus Railroad, because there was at that time none such to be continued.

The Supreme Court also claimed that Sections 3379, 3875, and 3744 of the Code of 1892 subjected all railroads in the state to taxation, regardless of any exemptions contained in their charters.

The opinion of the Supreme Court, however, wholly omits to consider Section 8 of the same Revised Code, which is as follows:

> "8. *Private and local laws not affected, unless,* etc.—Private and local laws not revised and brought into this Anno-

tated Code are not affected by its adoption, unless it be expressly so provided herein."

Thus, the very Code which by certain *general* provisions is considered to have repealed the exemption granted in a railroad charter, is by the Code itself declared to have no application to such law, "unless it be expressly so provided herein."

There is no such provision of an express character in the code.

If there is any repeal, it is by the most general terms; in other words, by implication. Such repeals are not favored; and *generalia specialibus non derogant.*

The several sections of the Code of 1892 are to be considered together; and thus considered, it seems clear that a railroad company expressly and specially exempted from taxation, is not subject to those provisions which apply only to those otherwise liable to be taxed; for the provisions of the Code are designed solely to effect the assessment of what is liable to be taxed, so as to collect the taxes.

It is true that Section 3744 reads as follows:

"The following property, and no other, shall be exempt from taxation, to-wit:"

Also, that amongst the properties in that section enumerated as being exempt, are not mentioned railroad properties. But (without reference to the express provision of Section 8 of the Code, cited above), it is manifest, and such is the only reasonable construction of the section, that what was thereby intended was to provide for the granting of exemptions by force of the section itself in the case of properties not otherwise exempt; and to grant such exemption, in regard to the classes of property therein mentioned, and to the extent mentioned, to any and all persons owning the same in the state, and without any reference to special conditions or special contracts.

It was a paragraph *conferring* exemptions in general, and not a paragraph intended to repeal existing special exemptions. The expression "and no other" therein used, is a limitation upon the

grant of exemptions therein made, and intended to exclude the *inference* of any grant of exemptions by the argument based on similarity in kind. Especially is this view of the statute reinforced by holding in mind the clear declaration of paragraph 8.

Moreover, in the very same chapter on Revenue, in the Code, we find Sections 3875 and 3877 (the latter section not being adverted to by the Supreme Court of Mississippi in its opinion).

Section 3875 (See Appendix, page 32), so far as material, runs as follows:

> "Each railroad company owning and operating a railroad shall, on or before the first Monday of April in each year, file with the Railroad Commission, a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein," etc.....
> "And if any of said property is claimed to be exempt from taxation, it shall be expressly stated and the law cited under which the claim is made."

Section 3877 (See Appendix, page 33), so far as material, is as follows:

> "The members of the Railroad Commission are constituted said railroad assessors, and they shall, upon the receipt or making and completion of the schedules provided for in the last two sections, assess all railroads, telegraph, sleeping car, and express companies *property, liable to taxation in the state,* affixing its true value, so that said property shall bear its just proportion of taxation," etc.

Here, then, is a clear recognition of the fact that the Code is not intended to repeal exemptions, but that the Railroad Commission are to abstain from assessing exempt railroad property for taxation.

Section 3875 provides that the schedule filed as the basis for the assessment, shall be a schedule of all the property "taxable and non-taxable."

The Supreme Court of Mississippi says of this (77 Miss. 292), that "The word 'non-taxable' in this connection, does not mean

exempt property, but property like government bonds that are not taxable at all." We submit that this is a very far-fetched and untenable assumption. As the Supreme Court itself insists, under and by virtue of Section 3744, there is no "non-taxable" property to exist in the state, except such as is enumerated as non-taxable by that section. Of such property, then, what is it to be supposed that a railroad company shall own? Is it a cemetery? Is it any property belonging to the United States? Is it wearing apparel? Is it a gun—or poultry?

On the other hand, if there is to be no non-taxable property under the law of the state, except such as is enumerated in Section 3744 (all which clearly is not property of such nature as that the legislature would speculate on the ownership of it by a railroad company), then we are forced to the position that the property must be "non-taxable," either because of its being connected in some way with the fiscal system of the United States government and exempt under the federal law, or it must be "non-taxable" because of the provisions contained in the railroad charters.

Is it reasonable to suppose that in blocking out the fiscal system of the state of Mississippi, the legislature undertook to speculate about the ownership by railroads of the very unlikely property of "government bonds," or of any other fiscal agency of the federal government? If such possibility should occur to the mind of a legislator, and the legislature were careful to make such reservation in Section 3875, why did they not also make a similar reservation in Section 3744? There is no provision in Section 3744 that government bonds shall be exempt from taxation, or that greenbacks should be; why the difference?

It is perfectly manifest that the legislature did not undertake in either section to deal with this subject-matter; and, therefore, we are forced to the conclusion that the expression used in the statute of "taxable and non-taxable," did not mean what the Supreme Court of Mississippi held it to mean, but did mean the

exempt railroad property, exempted under their respective charters.

The Supreme Court of Mississippi, in this connection, said that the word "non-taxable" did not mean exempt property, but property like government bonds that are not taxable at all, and then stated that "This is made plain by the provision at the close of the section that 'if the said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.'"

We submit that the precise reverse is correct. Such a proposition is not made plain by the closing provision. How the court could deduce such a conclusion, is inexplicable to us. The closing paragraph seems to make plain precisely the contrary idea. It is perfectly manifest that the closing provision was intended to refer to and effectuate the previous provision in the same paragraph in regard to "non-taxable" property. The bare fact that the legislature used the word "non-taxable" in one case, and "exempt," in the other, affords no basis for a discrimination in legal effect; because, used in this connection, the two words are synonymous.

The foregoing view is re-enforced by the fact that in Section 3877 (not noticed by the Mississippi Supreme Court) the express provision is that the Railroad Commission shall assess all railroad, telegraph, sleeping car, and express property "liable to taxation in the state."

Here is a manifest additional recognition of the fact that there is to be found in the state railroad property "not liable to taxation."

Sec. 3379, relied on, is nothing but a paragraph in the privilege tax law. That law was general in its nature. The legislative mind was not directed to any special railroad, so far as any evidence to be found in the statute is concerned. The classification for privilege taxation was manifestly intended to apply

to such as were subject to taxation, but there is no evidence (especially considering Section 8) that it was intended thereby to subject any company by contract exempted, or to recede from any enactments or plighted faith by which the state was bound.

The smallness of the privilege tax imposed, on which the Supreme Court of Mississippi lays stress, is easily accounted for; the Code of 1892 for the first time imposed a privilege tax on railroads subject to taxation, as a cumulative tax. Prior to that time, whenever a railroad liable to taxation paid a privilege tax at all, it was a mere commuted tax in lieu of an *ad valorem* tax. Naturally, when railroads already liable to taxation on their property, were subjected to an additional tax on their business, it was made small comparatively.

On the second appeal of the *Adams* case, the Mississippi Supreme Court considered the effect of Section 8 of the Code of 1880 (not that of 1892), as applied to the alleged operation of that Code on the exemption of the Natchez, Jackson & Columbus Railroad Company (77 Miss., p. 317). The discussion arose incidentally out of the observations made by the court in its previous opinion (77 Miss. 290). The court then maintained that Section 8 of the Code of 1880 did not prevent that Code from repealing the exemption of the Natchez, Jackson & Columbus Railroad, because that railroad was expressly named in Section 608 of the Code of 1880. But this court will observe that if there was any force in that position, the same is utterly without force in the case at bar, because the Code of 1892 does not anywhere name the Gulf & Ship Island Railroad, or any other railroad which claimed a charter exemption, in any way as being liable to a tax.

The argument of the court below, on page 317, is a boomerang so far as it affects this case.

Moreover, Section 8 in the Code of 1892 is even more emphatic in its declaration than Section 8 of the Code of 1880, be-

cause the word "expressly" is inserted into the section as it appears in the Code of 1892.

It can not be properly said that on this writ of error it is not open to us to question the soundness of the holding that the grant of exemption, if originally made in 1882 and if repealable under the view announced in *Mississippi Mills vs. Cook,* was repealed by subsequent legislation.

To put it differently: It can not be said that we are shut in to the proposition that the grant of exemption was irrepealable and that the legislature of Mississippi by statute subsequently enacted had undertaken to repeal it; or otherwise, that this court is without jurisdiction for want of the subsequent legislation.

We maintain that even if the statute was repealable by the legislature, and even if the legislature has never undertaken to repeal it; yet still if the courts, in the construction and application of the general revenue laws of the state, those revenue laws being themselves subsequently enacted, have thereby deprived the company of its exemption—the case comes within the jurisdiction of this court under the contract clause of the constitution of the United States.

In *The Bridge Proprietors vs. Hoboken, etc., Co.,* 1 Wallace, 116, this Court said:

> "It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs' contract and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

In *New Jersey vs. Wright*, 117 U. S. 648, this court said:

> "The question, then, will be whether the long acquiescence of the land owners, under the imposition of taxes, raises a presumption that the exemption which once existed has been surrendered.
>
> "This question, by itself, would be a mere question of state municipal law, and would not involve any appeal to the constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a state law, as in this case by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

See also *McCullough vs. Virginia*, 172 U. S. 102, 116.

This Court also, in *I. C. R. R. Co. vs. Wirt Adams, State Revenue Agent*, 180 U. S. 28, held that a case arising under the contract clause of the United States constitution was raised by a bill which set forth precisely the same case with that at bar; in which it was expressly charged that the case of *Mississippi Mills vs. Cook*, was relied on in the acceptance of the company's charter and the construction of its railroad, and in which it was not denied that the legislature had the power to repeal the statute if it saw proper so to do—which features of the bill are fully and clearly set forth in the opinion of the court.

Even if it be true that plaintiffs in error contracted for an exemption defeasible by the legislature, under the rule announced in the *Mississippi Mills* case, it still is true that by the contract it was to be deprived of that exemption by the action of the legislative department only, and not by mistaken action of the courts in subverting established principles and applying subsequently enacted general laws not intended by the legislature to apply to the case.

In the following cases the court determined for itself whether or not there was still an existing contract, or whether the rights acquired thereunder had been waived, or had been lost or surrendered by consolidation, or otherwise: *Morgan vs. Louisiana,* 93 U. S. 217, 219; *Railroad Co. vs. County of Hamblen,* 102 U. S. 273, 275; *Wilson vs. Gaines,* 103 U. S. 417; *Louisville & Nashville R. R. Co. vs. Palmes,* 109 U. S. 244, 256; *Memphis Railroad Co. vs. Commissioners,* 112 U. S. 609, 617; *St. Louis, Etc., Railway Co. vs. Berry,* 113 U. S. 465, 472; *Chesapeake & Ohio Railway Co. vs. Miller,* 114 U. S. 176; *Given vs. Wright,* 117 U. S. 648, 655; *Keokuk & Western Railroad vs. Missouri,* 152 U. S. 301, 305; *Mobile & Ohio Railroad vs. Tennessee,* 153 U. S. 486, 492; *St. L. & San Francisco Railway vs. Gill,* 156 U. S. 649, 656; *Norfolk & Western Railroad vs. Pendleton,* 156 U. S. 667, 673; *Mercantile Bank vs. Tennessee,* 161 U. S. 161, 171; *Stearns vs. Minnesota,* decided Dec. 3, 1900.

Conclusion.

We, therefore, submit that considering this cause from various points of view, as the court will observe we have not confined ourselves to a single line of argument, this case should be reversed.

Respectfully submitted,

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EDWARD MAYES,
For Plaintiffs in Error.

APPENDIX.

A

Charter History and Statutes Relating to Gulf & Ship Island Railroad Company.

Laws of Mississippi, 1850, page 324.

An Act to incorporate the Gulf & Ship Island Railroad Company.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That Wm. B. Hawthorne, Archibald Clarke, Jacob Elmer, Joseph R. Plummer, Lyman Randall, Alfred E. Lewis, William Griffin, P. J. Myers, Griffin H. Holliman, Joel E. Wilburn, and John West, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the Gulf & Ship Island Railroad Company, and by that name to sue and be sued, plead and be impleaded, in any court of this State; to make and have a common seal, and the same to break, alter or amend, at pleasure; and the company is hereby vested with all powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this Act, hereinafter set forth; and said company is hereby authorized and empowered to locate, construct and finally complete, a single, double or treble railroad or way from some suitable point upon the coast of the Gulf of Mexico, as near Ship Island as may be, in a northern direction, as near as may be to intersect the Southern Railroad, at any point which

they may deem most suitable between Brandon and Quitman in Clarke County, and to transport, take and carry property and persons upon said railroad or way, by the power and force of steam, of animals or of any other mechanical or other power, or any combination of them, which the said company may choose to apply; and for the purpose of constructing said railroad or way, the said company is hereby authorized to lay out their road, not exceeding two hundred feet wide, through the whole length; and for the purpose of depots, cuttings and embankments, and for the purpose of necessary turnouts, and for obtaining stone, gravel, timber, and other materials which may be necessary, may take as much more land as may be necessary for the construction and security of said road, with permission to make any lawful contract with any other railroad corporation in relation to the business of said company, and also to make joint stock with any other railroad corporation: *Provided,* that all damages that may be occasioned to any person or corporation, by taking of any such land or materials aforesaid, for the purpose aforesaid, shall be paid for by said company, in manner hereinafter provided.

(Here follow Sections 2 to 15 inclusive, not material to this case and hence omitted.)

This charter was approved March 5th, 1850.

Laws of Mississippi, 1854, page 168.

An Act entitled an Act to amend an Act to incorporate the Gulf and Ship Island Railroad Company, approved March 5, 1850.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That hereafter J. F. Foute, Samuel Freelander, Wm. A. Ware, C. F. Hemingway, John B. Toulme, Pierre Saucier, Jacob Elmer, Wm. Griffin, Donald McBean, W. B. Hawthorne, C. McLaurin, Ebenezer Ford, and John G. Robinson and

their associates be and they are hereby incorporated into a body politic and corporate under the name and style of the Gulf and Ship Island Railroad Company, and by that name are hereby authorized to have and to hold such real and personal property as may be necessary for the objects of this corporation, to make contracts, sue and be sued, and to have a common seal; and for the management, direction and control of said Company, to make such rules, regulations, by-laws and ordinances as a majority of the stockholders, in value, shall direct from time to time.

SEC. 2. *Be it further enacted,* That the corporators aforesaid, together with their associates and successors, shall have full power to organize such form of government and appoint such officers for the administration of the affairs and interests of the Company, as a majority of the stockholders, in value, shall from time to time direct and establish. And said Company so organized, authorized and empowered, and shall have the right to construct, have and maintain a railroad of one or more tracks as they may deem necessary, together with engine and car houses, work shops, depots and fixtures, bridges, boats, engines and operative requirements of all kinds; which said road extended from a point to be selected by said Company on the shore of the Gulf of Mexico between the Pass Christian and the Bay of Biloxi in the County of Harrison, and from thence extending in a northerly direction to the city of Jackson, or the town of Brandon, or Canton, as shall be deemed the most advantageous to said Company.

SEC. 3. (Not material, hence omitted.)

SEC. 4. *Be it further enacted,* That there is hereby granted to the said Gulf & Ship Island Railroad Company for the tract of said road, a fee simple title of any lands now owned by this State on the route upon which the line of said road may be established, in the continuous width of two hundred feet with full power to take and use timber, stone and earth from other lands adjacent now owned by the State, to construct and keep in repair said road.

(Sections 5 to 10, inclusive, not material, hence omitted.)

SEC. 11. *Be it further enacted,* That the property and investments of the Company connected with this enterprise, within

this State, shall not be subject to taxation until the road shall be in full operation and completed.

SEC. 12. *Be it further enacted,* That the act to which this is an amendment shall be and is hereby repealed as far as the same is inconsistent with the provisions of this act, and that this act be in force and take effect from and after its passage.

Approved, March 1st, 1854.

Laws of Mississippi, 1860, page 189.

A Memorial of the Legislature of the State of Mississippi to the Congress of the United States, praying the cession of certain public lands to aid in the construction of the Gulf & Ship Island Railroad.

WHEREAS, The building of the Gulf & Ship Island Railroad is an enterprise of great importance to the interest and prosperity of the State of Mississippi, and important to the agricultural and commercial development of the western States and northwestern territory—connecting, as it will, with lines of railroad that run through the most fertile and productive lands in the world, and desiring to build up at its terminus a commercial city on the seaboard, which will have the advantage of one of the best harbors on the gulf or on the Atlantic coast; and

WHEREAS, The federal government is interested in having the means for a speedy transit, in time of war, to this otherwise almost defenseless coast; and

WHEREAS, The lands in the southern portion of Mississippi, through which this road is designed to run, are valueless without the success of this enterprise being available for lumber or the production of turpentine alone, which, to be profitable, must have cheap and speedy transportation; therefore

Resolved by the Legislature of the State of Mississippi, That our Senators in Congress be instructed, and our Representatives

required to use their best exertions to procure the passage of an act by the Congress of the United States, donating, in addition to whatever has already been granted, five hundred thousand acres of land, to be held in trust by the State of Mississippi for the completion of said Gulf & Ship Island Railroad; or for so much land in addition to the present grant, as Congress in its wisdom may be willing to donate.

Resolved, That should Congress refuse to make an additional grant of lands for said work, that our Senators be instructed, and our Representatives required to procure for the State of Mississippi, if possible, the privilege of entering at the minimum price, all the public lands lying within — miles on both sides of the air line connecting its southern with its northern terminus.

Resolved further, That the Governor be instructed to furnish our Senators and Representative, each, with a copy of the foregoing memorial and resolutions.

Approved Feby. 10, 1860.

Laws of Mississippi, 1861, page 36.

An Act to suspend the collection of the Gulf & Ship Island Railroad tax, and for other purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That "An Act to authorize the Board of Police of Rankin County to subscribe for stock in the Gulf & Ship Island Railroad Company," and, "An Act to authorize the Board of Police of Madison County to subscribe for stock in the Gulf & Ship Island Railroad Company," both of which acts approved Nov. 30, 1860, be, and the same are hereby suspended until one year at least after peace shall be restored in the Confederate States of America and the United States; but this suspension shall in no way impair or destroy any of the rights or privileges of said Company in these taxes or any other matter.

SEC. 2. *Be it further enacted,* That said Company is hereby authorized to suspend all action until one year at least after such peace shall be restored without impairing or destroying any right or privilege now belonging to said Company.

SEC. 3. *Be it further enacted,* That all laws or parts of laws contrary to the provisions of this act, be, and the same are hereby repealed.

SEC. 4. *Be it further enacted,* That this act shall take effect and be in force from and after its passage.

Approved Aug. 2nd, 1861.

Laws of Mississippi, 1866, page 18.

An Act to authorize the Governor of the State to appoint an agent to secure a re-grant of lands from the Congress of the United States to the Gulf & Ship Island Railroad.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That the Governor of the State is hereby authorized to appoint an agent to secure a re-grant of lands from the Congress of the United States of America to the Gulf & Ship Island Railroad.

SEC. 2. *Be it further enacted,* That the sum of five hundred dollars be, and the same is hereby appropriated out of any money in the State Treasury to pay the expenses of the agent to be appointed under the first section of this act.

SEC. 3. *Be it further enacted,* That this act take effect and be in force from its passage.

Approved October 30th, 1866.

Laws of Mississippi, 1872, page 155.

A Memorial to Congress for the request of lands to aid the construction of the Gulf & Ship Island Railroad.

WHEREAS, The United States did, on August the 6th, 1856, grant to several railroads, alternate sections of land lying on the contemplated route for the purpose of aiding their construction; one of the roads thus sought to be benefitted, was the Gulf & Ship Island Road, chartered by the Legislature; the proposed route of this road begins at Mississippi City, and terminates at Canton, in this State; the grant of land was complied with, on condition that the road should be completed within ten years; under this condition, the land so granted lapsed to the United States, owing to the intervention of war between the States; the company was unable to complete the road, and thus lost the aid contemplated by Congress; the construction of the road would have led to the development of the harbor of Ship Island, which is one of the best on the line of the seacoast, south of Norfolk, Virginia. This harbor was occupied by the British fleet during the war of 1812, and was held by the federal navy during the late war; the value of this harbor is well known to every one connected with the maritime department of the United States; this road would pass through a country abounding in the finest pine forests, and capable of sustaining a dense population; without this road, the region of counties (country) through which it would pass, must remain comparatively a dense wilderness for generations to come; with this road constructed and in operation, this country now so isolated would fill up with a large population, its unsurpassed wealth of timber would become available to the ever increasing demand of lumber, and its agricultural products would find an easy transit to the commercial marts of the world; therefore

Be it resolved by the Legislature of the State of Mississippi, That our Senators and Representatives in Congress be requested to urge the passage of an act reviving the grant of land made to the Gulf & Ship Island Railroad in the year 1856.

Be it further resolved, That the Governor is requested to forward a copy of this memorial to each of our Senators and Representatives in Congress.

Approved, Dec. 4, 1872.

Laws of Mississippi, 1882, page 849.

An Act to incorporate the Gulf & Ship Island Railroad Company.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That Wirt Adams, S. Gwinn, R. A. Dabney, E. Barkesdale, J. S. Hamilton, T. Jones Stewart, A. Hoskins, Geo. C. McKee, J. J. Thornton, T. J. Montross, together with those who may hereafter become associated with them, their successors and assigns, be, and they are hereby created a body corporate and politic, by the name and style of The Gulf & Ship Island Railroad Company, and as such shall have perpetual succession, and by that style, title and name, sue and be sued, plead, and be impleaded in law or equity, and purchase, receive, hold and convey real and personal estate, and the same retain to themselves, their successors, and assigns, so far as it shall be necessary for their accommodation and convenience in the transaction of their business, and such as may in good faith be conveyed to them by way of security, or in satisfaction of debts, or by donation, and it shall be lawful for the directors of said company to receive in payment of subscription to the capital stock of said corporation, under such regulations and restrictions as may be prescribed by them, any real or personal property that may be offered by persons wishing to subscribe to the capital stock of said Company; and they shall have the right to sell, convey and dispose of said real or personal property at any such time and on such terms as may best subserve the purposes of building and maintaining said road and harbor contemplated by this instrument.

SEC. 2. *Be it further enacted,* That said Company is hereby authorized to locate, construct, manage, control, maintain, equip, own, use and operate its railroad at such point as may be determined by said Company, from a point on the shore of Mississippi Sound in this State, and in a northerly direction to a point at or near Jackson, Hinds County, Mississippi, or other point on the Chicago, St. Louis & New Orleans Railroad, and to receive and transport persons and property upon said road, as hereinafter provided; and for the purpose of constructing said railroad, said Company is hereby authorized and empowered to lay out their

roadway not exceeding two hundred feet wide, and not less than fifty feet distant on each side from the center of the track, and the said Company shall receive and transport the cars of any other railroad with which it may connect, upon such terms as may be agreed upon between said railroad companies.

SECS. 3 and 4 not material and hence omitted.

SEC. 5. *Be it further enacted,* That said Company be and is hereby invested with all the rights, powers, privileges and authority necessary for the location, construction, management, control, building, equipping and operating a railroad, as prescribed in Section 2nd of this Act, with all such appurtenances and appendages as may be necessary or expedient, including all depots for the reception and accommodation of passengers, and all warehouses, water stations, machine shops, or car houses and other necessary buildings, of whatever description; they shall have power to make contracts with any person or persons on behalf of said Company for constructing or repairing said railroad and superstructure, or any part thereof; and performing any work respecting the same, which they may deem necessary or proper; to require from the stockholders from time to time payment of their stock subscriptions in such manner as they may direct, until the whole shall be paid, and to adopt such rules and by-laws for the government of said Company as they may deem necessary not inconsistent with the laws of this State, or he United States.

SECS. 6 to 17 inclusive are not material and are therefore omitted.

SEC. 18. *Be it further enacted,* That in order to encourage the investment of capital in the works which said Company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said Company, its stock, its railroad, and appurtenances, and all its property in this State necessary or incident to the full exercise of all the powers herein granted shall be exempt from taxation for a term of twenty years from the passage of this Act.

* * * * * * *

SEC. 19 not material.

SEC. 20. *Be it further enacted,* That all acts or parts of acts

in conflict with this act be, and the same are hereby repealed, so far as this Company hereby incorporated, is or may be affected thereby, and that this act take effect and be in force from and after its passage.

Approved February 23, 1882.

Laws of Mississippi, 1882, page 131.

A Memorial to the Congress of the United States in reference to waiver of forfeiture of the grant in aid of the Gulf and Ship Island Railroad.

To the Senate and House of Representatives of the Congress of the United States in Congress assembled:

Your memorialists would respectfully show to your honorable body, that the State of Mississippi has made repeated but ineffectual efforts heretofore through its Legislature, in the form of Resolutions and Memorials to Congress, to obtain a revival of the grant of public lands made by the Government in 1856, to aid in the construction of the Gulf & Ship Island Railroad. That this liberal and valuable donation was lost by no supineness or indifference of our people, but by the interruption of all works of internal improvement caused by the late war, and since its close, to the prostration and poverty which it entailed. No enterprise in our State has ever received more repeated and cordial endorsement from our Legislature and people than this. At its present session our Legislature has granted a new act of incorporation with liberal provisions, thus again attesting the abiding and earnest interest felt by our people in this important work.

It is almost superfluous to dwell on the great benefits to our State which would result from the construction of this road. It would gratify a long cherished aspiration of all Mississippians to have, within our own borders, a seaport town through which

the export and import trade of the State could be conducted. It would speedily populate and develop the resources of the large section of our State hitherto isolated and neglected for want of facility of access; a section of immense resources in its magnificent pine forests, its bold, perennial streams, which afford unlimited water power, and its genial salubrious climate, making it the appropriate seat of cotton and woolen manufacture on a large scale. There is no portion of our State so well adapted to sheep husbandry, stock raising and farming on a small scale. We are persuaded that its natural advantages would speedily attract a hardy and thrifty population from the West and North, and that the development of its great natural resources would add largely to the wealth of our State and its annual revenues. So long as 1860, Prof. Eugene W. Hilgard, of the University of Mississippi (distinguished throughout the country for his valuable contribution in science), says: "The most casual observer, as soon as personal inspection shall have made him conscious of the reality, cannot fail to be impressed with the immense importance of opening a highway through which Mississippi may communicate over her own, with a portion of her territory which possesses both a harbor commensurate with the magnitude of her commercial interests, and a climate, not only healthful and pleasant, but capable, moreover, of producing many of the choicest fruits of the tropics, as well as the temperate zone. Along with the cotton bales of north and central Mississippi, the lumber and turpentine of the vast pine forests of the State, would find their way with this channel to the great highway of nations. Nor would the ample grazing grounds which separate these forests from the coast, long remain without a land mark to guide the traveler. May the day not be far distant when one uninterrupted band of iron shall link together wheat and cotton fields of the South and West with the live oaks and orange groves of the coast of Mississippi."

It is not our State and its people alone who would reap advantages from the construction of such a road. The work would possess a semi-national importance in affording to the grain growers of the West and the Northwest the shortest and cheapest line of transportation to the Seaboard, for the export of their large annual surplus of products; while at the same time it

would enable them to receive their supplies of sugar, coffee, and other tropical products, as well as foreign merchandise, at a great reduction in the costs of transportation. The Legislature of Mississippi has just granted a charter to the Yazoo Valley & Mississippi River Railroad, to extend from Jackson, via Yazoo City, to Arkansas City in the State of Arkansas. This franchise was obtained by the Chicago, St. Louis & New Orleans Railroad Company, which, with ample capital, proposes building this line without delay. The addition of the remaining link from Jackson to Pascagoula, or other point on our seaboard, opposite Ship Island Harbor, will then connect the grain fields of the West and Northwest by almost an air line of railway with the shipping of the world at that port.

We must consider the most important practical question of the resources available for the work. It is manifest the road cannot be built by corporate or individual subscriptions in our own State. The well known pecuniary condition of our people forbids such a hope. But we have good reason to believe that if the former grant of government lands can be revived, a substantial basis of credit will be created; and with this material aid assured, there will be no difficulty in enlisting Northern and foreign capital to insure the early completion and equipment of the road.

It is apparent that this revival of the government land grant or waiver of forfeiture on the terms and conditions of the original grant becomes the all important and indispensable condition of success in the undertaking. Hence, we make this direct appeal to Senators and Representatives in Congress and earnestly request that they will, without delay, revive and extend the grant of 1856, at the present session of Congress, and as in duty bound, your memorialists will ever pray, etc.

Resolutions of the Mississippi Legislature Accompanying the Memorial to Congress in Reference to the "Gulf & Ship Island Railroad."

Resolved by the Legislature of the State of Mississippi, That our Senators and Representatives in Congress be requested to present to their respective Houses of the National Legislature in Congress assembled, the foregoing memorial, and to urge upon their Houses suitable Bills to secure the waiver of the forfeiture, and extension of time asked in the foregoing memorial.

Resolved, further, That His Excellency, the Governor, be requested to forward copies of the foregoing memorial and resolution to our Senators and Representatives in Congress.

Adopted by the House of Representatives, March 8, 1882.

W. H. H. TISON,
Speaker of the House of Representatives.

Adopted by the Senate, March 7, 1882.

R. O. REYNOLDS,
President of the Senate.

ROBERT LOWRY,
Governor.

Approved March 9th, 1882.

Acts 1884, page 971.

An Act to facilitate the construction of the Gulf & Ship Island Railroad, and for other purposes.

WHEREAS, The penitentiary and convicts have been leased to Hamilton, Allen & Co., and their assigns, for a term of years beginning on the 1st day of January, 1881, and ending on the 1st day of January, 1887, and the placing of convicts on farms,

and sub-contractors, is not satisfactory in its results and is not approved by the people; and

WHEREAS, The Gulf & Ship Island Railroad, as projected, is an enterprise in which the whole State is interested, as the building of said road would do much towards developing a large section of the State, thereby greatly increasing its revenues and bring into practical utility the splendid harbor at Ship Island, thereby giving the State a seaport for foreign as well as domestic commerce; therefore

SECTIONS 1 to 6 inclusive are not material and are therefore omitted.

SEC. 7. *Be it further enacted,* That the charter of the Gulf & Ship Island Railroad Company be so amended as to extend the construction of the line of said railroad beyond the present limit authorized by the charter of said company; and for that purpose may issue additional bonds and stock of said company, but in no event shall bonds be issued by said company on said road to an amount exceeding twenty thousand dollars per mile; and the Gulf & Ship Island Railroad shall run the line of said railroad from its southern terminus along the line of the old survey of the Gulf & Ship Island Railroad, centrally through the State as far as practicable to the town of Pontotoc, Pontotoc County, Mississippi, thence north of northeast or northwest to the boundary line of the State, or to the Tennessee river, as may be determined by the board of directors of said Company.

SEC. 8. *Be it further enacted,* That said Gulf & Ship Island Railroad Company are hereby subrogated to all the rights and privileges heretofore granted by the State of Mississippi to the Gulf & Ship Island Railroad Company, and shall have the right to use and enjoy such field notes, maps and surveys as have been heretofore made in the interest of said road as were authorized and granted by the State under the acts approved March 2nd, 1854, and December 3rd, 1858.

Approved March 13, 1884.

xv

United States Statutes at Large, 1890; Vol. 26, p. 496; Chap. 1049.

An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and co-terminus with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; *provided,* that this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

* * * * * * *

SEC. 7. That in all cases where lands included in a grant of land to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf & Ship Island Railroad, have heretofore been sold by the officers of the United States for cash, or with the allowance or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or upon which there were *bona fide* pre-emption or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed and persons claiming the right to enter as aforesaid may perfect their entry under the law. And on condition that the Gulf & Ship Island Railroad Company within ninety days from the passage of this act shall, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said Company's interest, right, title, and claim in and to all such lands as have been sold, entered, or claimed as aforesaid,

then the forfeiture declared in the first section of this act shall not apply to or in anywise affect so much and such parts of said grant of lands to the State of Mississippi as lie south of a line drawn east and west through the point where the Gulf & Ship Island Railroad may cross the New Orleans & Northeastern Railroad in said State, until one year after the passage of this act. And there may be selected and certified to or in behalf of said Company lands in lieu of those hereinbefore required to be surrendered to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

Approved September 29th, 1890.

B

References to Some Statutes of Mississippi Prior to 1869, Reserving Power to Tax Corporations.

The Legislature expressly reserved power to impose taxes in the following charters:

1833. Commercial and Railroad Bank of Vicksburg (Laws 1833, p. 129).
1836. Commercial Bank of Rodney (Laws 1836, p. 137).
" Commercial Bank of Manchester (*id.*, p. 142).
" Commercial Bank of Columbus (*id.*, p. 152).
" Tombigbie Railroad Company (*id.*, p. 227).
" Aberdeen and Pontotoc Railroad and Banking Company (*id.*, p. 241).
" Tallahatchie Railroad Company (*id.*, p. 283).

In the following instances the charters provided that the capital stock of the respective corporations should "from time to time, as the Legislature may hereafter direct, be subject to be taxed annually." * * *

1833. Grand Gulf Railroad and Banking Company (Laws 1833, p. 147).
1836. Mississippi and Alabama Railroad Company (Laws 1836, p. 165).
" Lake Washington and Deer Creek Railroad and Banking Company (*id.*, p. 215).

The following acts expressed in varying language the same reservation of power to the Legislature.

1833. Protection Insurance Company (Laws 1833, p. 84).
" West Feliciana Railroad Company (*id.*, p. 153).
1836. Gainsville and Narkeetah Railroad Company (Laws 1836, p. 86).
" Mississippi Springs Railroad Company (*id.*, p. 296).
1850. Yazoo and Houston Railroad Company (Laws 1850, p. 352).
1859. Warren Insurance Company (Laws 1859, p. 122).

1862. Columbus Life and General Insurance Company (Laws 1862, p. 295).

In the following charters the Legislature expressly declared that the property of the respective corporations should be "subject" or "liable" to taxation:

1836. Commercial Bank of Natchez (Laws 1836, p. 252).
1852. Columbus Life and General Insurance Company (Laws 1852, p. 199).
1854. Memphis and Charleston Railroad Company (Laws 1854, p. 86).
1865. Hernando Mutual Insurance Company (Laws 1865, p. 314).
" Pearl River Manufacturing Company (*id.*, p. 381).

The Legislature of 1866-67 (the last session held before the adoption of the Constitution of 1869) in the charter of the Memphis, Holly Springs and Mobile Railroad Company expressly reserved to the State the power to levy income taxes upon the travel on the railroad (Laws 1866-67, p. 637), and reserved the same power in respect to the New Orleans, Mobile and Chattanooga Railroad Company (*id.*, p. 344). In the cases of the Bradford Machinery Company (*id.*, p. 473) and the Hashuqua Manufacturing Company (*id.*, p. 712) provisions were inserted declaring that the property and effects of the companies should remain liable to taxation.

C

Charters Granting Exemptions from Taxation Between 1869 and 1890.

1870. Whitworth Female College, (Laws 1870, pp. 380, 381).
" Macon Male School (Laws 1870, pp. 401, 402).
" Attala County Agricultural and Mechanical Association (Laws 1870, pp, 457, 459).
1873. Educational Society of South Mississippi and East Louisiana (Laws 1873, pp. 429, 433).
" Baldwyn Female College (Laws 1873, p. 435).
" University of Columbus (Laws 1873, pp. 438, 439).
" Plowman and Agricultural Society (Laws 1873, p. 462).
1874. Abbeville Female College (Laws 1874, p. 158).
1877. Manufacturing Companies (Laws 1877, p. 72).
1878. Port Gibson, Utica and Crystal Springs Railroad Company (Laws 1878, pp. 463, 472).
" Brandon Street Railroad Company (Laws 1878, pp. 484, 487).
1880. All railroads while in process of construction (Laws 1880, pp. 19, 86).
" Lea Female College (Laws 1880, pp. 291, 293).
" Meridian and Aberdeen Fair Grounds (Laws 1880, p. 633).
1882. Purchasers of railroads at foreclosure, on incorporation (Laws 1882, pp. 47, 48).
" Delta Land and Manufacturing Company (Laws 1882, pp. 533, 537).
" Mississippi Improvement and Manufacturing Company, etc. (Laws 1882, pp. 545, 550).
" Mississippi Mining, Milling, etc., Company (Laws 1882, pp. 555, 558).
" Star Mining, Milling and Manufacturing Company (Laws 1882, pp. 559, 561).
" Marshall Mills (Laws 1882, pp. 561, 564).

1882. D. Mayer Agricultural and Manufacturing Company (Laws 1882, pp. 564, 565).

" Hope Oil Mill, etc., Company (Laws 1882, pp. 570, 573).

" Warren Cotton Mills Company (Laws 1882, pp. 587, 588).

" Luxapalila Manufacturing and Mining Company (Laws 1882, pp. 588, 591).

" Cooper's Wells Company (Laws 1882, pp. 599, 602).

" Meridian Mills (Laws 1882, pp. 606, 608).

" Blue Mountain Academy (Laws 1882, pp. 667, 668).

" Louisville Male and Female Seminary (Laws 1882, p. 670).

" Palo Alto Academy (Laws 1882, pp. 675, 676).

" Yazoo and Mississippi Valley Railroad Company (Laws 1882, pp. 838, 847).

" Memphis and New Orleans Railroad and Levee Company (Laws 1882, pp. 874, 883).

" Canton, Aberdeen and Nashville Railroad Company (Laws 1882, pp. 1001, 1009).

" Memphis, Selma and Brunswick Railroad Company (Laws 1882, p. 1022).

" Gulf and Ship Island Railroad Company (Laws 1882, pp. 849, 861).

" Birmingham and Northwestern Railroad Company (Laws 1882, pp. 1040, 1049).

" Tennessee and Mississippi Rivers Railroad Company (Laws 1882, pp. 989, 1000).

" Vicksburg and Northeastern Railroad Company (Laws 1882, pp. 1015, 1018).

" Meridian, Brookhaven and Natchez Railroad Company (Laws 1882, pp. 1049, 1064).

" Helena, Sardis, Pontotoc and Birmingham Railroad Company (Laws 1882, pp. 885, 895).

" Mississippi Mexican Gulf Railroad Company (Laws 1882, pp. 961, 974).

" Alabama and Mississippi Railroad Company (Laws 1882, pp. 863, 870).

" Mississippi and Arkansaw Railroad Company (Laws 1882, pp. 933, 942).

1882. Meridian, Winona and Helena Railroad Company (Laws 1882, pp. 943, 959).
" Mississippi, Alabama and Georgia Railway Company (Laws 1882, pp. 975, 988).
" Pass Christian City Railroad Company (Laws 1882, pp. 818, 821).
" City Railroad of Columbus (Laws 1882, pp. 822, 824).
" Georgia Pacific Railway Company (Laws 1882, pp. 824, 826, 834, 837).
1884. Mississippi State Fair Association (Laws 1884, pp. 827 829).
" Sunflower Navigation Company (Laws 1884, pp. 859, 862).
" Hunt and Huddleston College Faculty Association (Laws 1884, pp. 874, 876).
" Lea Female College (Laws 1884, pp. 878, 879).
" Maury Institute (Laws 1884, pp. 880, 881).
" Grenada Collegiate Institute (Laws 1884, pp. 881, 883).
" Caledonia Branch Railroad Company (Laws 1884, pp. 888, 895).
" Warrior Coal Fields Railroad Company (Laws 1884, pp. 895, 901).
" Tombigbee Railroad Company (Laws 1884, pp. 901, 907).
" Moss Point, Scranton and East Pascagoula Railroad Company (Laws 1884, pp. 911, 915).
" Macon and Tuscaloosa Railroad Company (Laws 1884, pp. 915, 916).
" Mississippi River and Deer Creek Railroad Company (Laws 1884, p. 918).
" Memphis, Oxford and Columbus Railway Company (Laws 1884, pp. 919, 920).
" Port Gibson & Alabama Railroad Company (Laws 1884, pp. 922, 934).
" Terry, Brandon and Northeastern Railroad Company (Laws 1884, pp. 936, 937).
" Helena, Memphis and New Orleans Railroad Company (Laws 1884, pp. 937, 938).
" West Point Street Railway Company (Laws 1884, pp. 941, 944).

1884. Tombigbee and Grand Trunk Railroad Company (Laws 1884, p. 950).

" Natchez and Mobile Railroad Company (Laws 1884, pp. 951, 953).

" Front and Asylum Street Railway Company (Laws 1884, pp. 955, 956).

" Mississippi River and Mexican Gulf Railroad Company (Laws 1884, pp. 957, 963).

" Rodney, Jackson and Tuscaloosa Railroad Company (Laws 1884, pp. 968, 969).

" Arkansas City, Winona and Eastern Railway Company (Laws 1884, pp. 969, 971).

" Mississippi River and Eastern Railroad Company (Laws 1884, pp. 975, 986).

" Tallahatchie Valley Railroad Company (Laws 1884, pp. 987, 992).

" New Orleans and Northwestern Railway Company (Laws 1884, pp. 994, 1004).

" Meridian and Brunswick Railroad Company (Laws 1884, pp. 1005, 1013).

" Helena, Water Valley, Aberdeen and Birmingham Railroad Company (Laws 1884, pp. 1014, 1023).

1886. Kansas City, Memphis and Birmingham Railroad Com- (Laws 1888, pp. 490, 499).

" Memphis, Birmingham and Atlantic Railroad Company (Laws 1886, pp. 203, 207).

" Pensacola and Memphis Railroad Company of Mississippi (Laws 1886, pp. 209, 221).

" Vicksburg, Yazoo-Delta and North Eastern Railway Company (Laws 1886, pp. 222, 227).

" Hill City Street Railway Company (Laws 1886, pp. 232, 235).

" Mississippi and Louisiana Bridge and Railroad Company, of Natchez, Mississippi (Laws 1886, pp. 237, 244).

" Port Gibson Female College (Laws 1886, p. 634).

" Cooper Normal College (Laws 1886, pp. 726, 727).

" Pittsboro Male and Female College (Laws 1886, pp. 734, 735).

1888. Macon, Tuscaloosa and Birmingham Railroad Company (Laws 1886, pp. 490, 499).
" Helena, Tupelo and Decatur Railroad Company (Laws 1888, pp. 500, 508).
" Brookhaven, Columbia and Mobile Railroad Company (Laws 1888, pp. 508, 509).
" Enterprise Street Railway Company (Laws 1888, p. 518).
" Vicksburg Electric Street Railway Company (Laws 1888, pp. 522, 523).
" Mississippi and Gulf Railroad Company (Laws 1888, pp. 542, 546).
" Mississippi Southern Railway Company (Laws 1888, pp. 548, 557).
" Columbus, Fulton and Eastport Railroad Company (Laws 1888, pp. 558, 563).
" Greenville and Durant Railroad Company (Laws 1888, pp. 563, 569).
" Waynesboro, Pascagoula and Gulf Coast Railroad Company (Laws 1888, pp. 570, 575).
" Greenville, Egypt Ridge and Bogue Phaliah Railway Company (Laws 1888, pp. 584, 591).
" Meridian Cotton Mills (Laws 1888, pp. 595, 596).
" Natchez Hotel (Laws 1888, p. 614).
" Deasonville High School (Laws 1888, p. 628).
" Liberty Male and Female College (Laws 1888, pp. 630, 631).
" Tombigbee Normal Institute (Laws 1888, p. 632).
" Montrose High School (Laws 1888, pp. 635, 636).
" Gulf Port Dental College (Laws 1888, p. 638).
" Mt. Carmel Normal College (Laws 1888, pp. 639, 640).
1890. Millsaps College (Laws 1890, pp. 553, 555).
" Pickens High School (Laws 1890, p. 561).
" Harper's Baptist College (Laws 1890, pp. 563, 564).
" Pleasant Hill High School (Laws 1890, pp. 569, 570).
" Hebron High School (Laws 1890, pp. 570, 571).
" Bellefontaine Male and Female High School (Laws 1890, p. 574).
" Saltillo High School (Laws 1890, p. 577).

1890. Waynesboro Normal Institute and College (Laws 1890, pp. 581, 582).
" Old Myrtle Normal College (Laws 1890, pp. 583, 584).
" Starkville Street Railway Company (Laws 1890, pp. 655, 660).
" Nashville and Mississippi Delta Railroad Company (Laws 1890, pp. 682, 687).
" Mississippi River, Alabama and Chattanooga Railroad Company (Laws 1890, pp. 703, 713).
" Greenville, Nashville and Chattanooga Railway Company (Laws 1890, pp. 732, 741).
" Columbus and Fulton Railroad Company (Laws 1890, pp. 743, 751).
" Alabama, Mississippi and Western Railroad Company (Laws 1890, pp. 751, 756).
" South Mississippi Railroad Company (Laws 1890, pp. 759, 767).
" Yazoo Delta Central Railway Company (Laws 1890, pp. 769, 778).

D

Statutes Which Have Been Construed to Repeal Exemptions from Taxation.

Chapter 22, Page 29, Acts of 1884.

An Act to amend Section 607 and 608 of Code of 1880, in relation to Privilege Tax on Railroads, and for other Purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That Section 607 of the Code of 1880 be amended so as to read as follows: Each and every railroad company which will accept this act, and annually pay to the Auditor of Public Accounts the taxes hereinafter provided for, and will signify their acceptance in writing, shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; two-thirds of which said tax shall be placed to the credit of the counties through which said railroads may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties, *provided,* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property, and for all purposes, any exemption of their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries; *provided further* that the provisions of this act shall not have the effect to tax any of the lands of the Memphis and Vicksburg Railroad Company until the 1st day of February, 1886.

Sec. 2. *Be it further enacted,* That Section 608 of the Code of 1880 be so amended as to read as follows: Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State Treasurer on

the warrant of the Auditor, on or before the fifteenth day of December in each and every year, a privilege tax as follows, to-wit: The Mobile and Ohio Railroad Company and branches, one hundred dollars per mile; the Chicago, St. Louis and New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis and Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile and Texas Railroad Company, or the Louisville and Nashville Railroad Company, one hundred dollars per mile; the Mississippi and Tennessee Railroad Company, one hundred dollars per mile; the Alabama Central Railroad Company, one hundred dollars per mile; the Alabama Great Southern Railroad Company, one hundred dollars per mile; the Vicksburg and Meridian Railroad Company, eighty dollars per mile; the West Feliciana Railroad Company, thirty dollars per mile; the Grand Gulf and Port Gibson Railroad Company, thirty dollars per mile; the Mississippi Valley and Ship Island Railroad Company, forty dollars per mile; the Ship Island, Ripley and Kentucky Railroad Company, twenty-five dollars per mile; the Mobile and Northwestern Railroad Company, twenty dollars per mile; the Greenville, Columbus and Birmingham Railroad Company, forty dollars per mile; the Natchez, Jackson and Columbus Railroad Company, forty dollars per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All the railroads not named herein and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempt from taxation by its charter.

SEC. 3. *Be it further enacted*, That Section 604 of Code of 1880, be amended by striking out all in said section after the word "purchaser" in the twentieth line.

Approved March 12, 1884.

Section 6, Chapter 2, Page 23, Acts of 1886.

SEC. 6. *Be it further enacted,* That the Act entitled "An Act to amend Sections 607 and 608 of the Code of 1880, in relation to privilege taxes on railroads, approved March 13, 1884, be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said Act at sums twenty-five *per centum* greater respectively than the sums mentioned in said Act; and hereafter said railroad companies shall pay privilege taxes respectively twenty-five *per centum* greater per mile than as fixed in said Act.

Laws of Mississippi, 1888, page 49.

CHAPTER 28.

AN ACT to provide for the assessment and collection of past due and unpaid taxes on railroads which have escaped the payment thereof.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That every railroad which has failed to pay the taxes for which the same was liable, for any year for which it was so liable, such railroad not being exempt by law or its charter from taxation for such years, and so being liable to taxation, shall be assessed for, and shall pay an *ad valorem* tax, to be assessed as hereinafter provided, unless such railroad shall, within sixty days after the passage of this act, pay the taxes for which the same was liable according to its charter, or shall pay the privilege taxes for which the same was liable, as follows: If a standard or broad gauge road, for the years prior to 1884, eighty dollars per mile; for the years 1884 and 1885, one hundred dollars per mile; and for the years 1886 and 1887, one hundred and twenty-five dollars per mile; and, if a narrow gauge, or not standard, or broad gauge road, for the years prior to 1884, forty dollars per

mile; for the years 1884 and 1885, fifty dollars per mile; and for the years 1886 and 1887, sixty-two dollars and fifty cents per mile.

SEC. 2. *Be it further enacted*, That sixty days after the passage of this act, the tax-collectors of the several counties through which any railroad runs (which said railroad has failed to pay the taxes for which the same was liable and has failed to avail itself of the provisions of the first section of this act, and paid taxes according thereto) shall assess as additional assessments every such railroad, in their respective counties, for the several years for which taxes have not been paid, on assessment lists duly prepared for that purpose by the railroad commission, whose duty, it shall beto prepare such assessment lists immediately after the passage of this act; such tax-collectors shall follow the provisions of § 513 for the assessment of lands left unassessed by the assessors as nearly as practicable, and such additional assessments shall be treated in all respects as additional assessments of land would or should by law be treated; *provided*, that, to secure uniformity in valuations in such additional assessments, such tax-collectors shall, after completing such assessment lists, forward the same to the railroad commission on or before the first day of June next; and such commission shall, at the office of said commission, on the first Monday in July next, proceed to consider such assessment lists, and correct and equalize the valuations therein, and raise or reduce the same, as they shall deem just and proper, and shall hear and determine all exceptions or obligations to such assessments, which said acts and doings and determinations of said commission each railroad company interested shall take notice as well of the time and place thereof. The State and each of said railroads shall have the right to appeal from any decision of questions affecting such assessments to the circuit court of the first district of Hinds county and thence to the Supreme Court; but, if such decision be not appealed from within ten days after the final determination thereof by the railroad commission, such decision and determination shall be final and conclusive. The Attorney-General may appeal on behalf of the State, and shall have notice of, and represent the State in, any case of appeal by any such railroad; *provided*, that any railroad appealing shall give bond to be approved by such commission in double the amount of all taxes assessed

against it and all costs likely to accrue, such amounts to be fixed by the commission. Such appeals shall be heard at the first term of court and disposed of; and if judgment be rendered against a railroad appealing, it shall include the whole amount of taxes due, together with ten *per centum* damages thereon, and shall be against the railroad company, and the sureties on the appeal bond for such taxes, damages and costs.

SEC. 3. *Be it further enacted,* That the several tax-collectors in assessing such railroads, and said railroad commission in correcting and equalizing such assessments, shall be governed by the provisions of section 600 of the Code of 1880, as far as the same are applicable.

SEC. 4. *Be it further enacted,* That after the railroad commission shall have completed the correcting and equalizing said assessment list it shall cause the valuations fixed by it to be extended into columns ruled for that purpose, and such valuations shall be deemed to be the true valuation of such railroads for purposes of such taxation; said commission shall then certify and return said lists to the respective tax-collectors, who shall, upon receipt thereof, calculate and extend into the columns ruled for that purpose, the State tax for each year unpaid, and in collecting county or levee taxes, shall calculate the same from the State tax for the respective years; and they shall cause two fair copies to be made, one of which they shall deposit with their respective clerks of the board of supervisors and forward the other to the Auditor.

SEC. 5. *Be it further enacted,* That the several tax-collectors, after depositing and forwarding the copies of the assessment lists as provided in section four of this act, shall proceed to collect such taxes, State, county (and levee, if any), in the same manner as they would collect taxes on lands in like condition; and in case sales may become necessary to enforce the payment of such taxes, the same shall be made as provided in § 558 of Code of 1880, and all the provisions of law applicable to sales of land in like cases shall apply in full force; and personal property of any such railroad may be seized and sold for such taxes in like manner as the property of an individual would be liable to be seized and sold.

SEC. 6. *Be it further enacted,* That this act take effect and be in force from and after its passage.

Approved April 3, 1888.

Section 5, Chapter 2, Acts of 1890, Pages 12 and 13.

SEC. 5. That Section (1) of the Act of March 12, 1884, relating to railroad privilege taxes, be amended by striking out the last proviso thereof, and that the same be re-enacted as amended. That section two of said Act of March 12, 1884, be amended by striking out all after the word "to-wit," in line nine and inserting the following:

The Alabama Great Southern, per mile	$150 00
The Canton, Aberdeen and Nashville, per mile	100 00
The East Tennessee, Virginia and Georgia, per mile	150 00
The Georgia Pacific, per mile	100 00
The Illinois Central and branches, per mile	150 00
The Kansas City, Memphis and Birmingham, per mile	150 00
The Louisville and Nashville, or Mobile and New Orleans, per mile	150 00
The Louisville, New Orleans and Texas and branches, per mile	150 00
The Mississippi and Tennessee, per mile	150 00
The Mobile and Ohio and branches, per mile	150 00
The Memphis and Charleston, per mile	150 00
The Natchez, Jackson and Columbus, per mile	50 00
The Vicksburg and Meridian, or Alabama and Vicksburg, per mile	125 00
The West Feliciana, per mile	100 00
The Yazoo and Mississippi Valley, per mile	100 00
The New Orleans and Northeastern, per mile	150 00
The Gulf and Ship Island (Northern Division), or Gulf and Chicago, per mile	60 00
The Gulf and Ship Island (Southern Division), per mile	60 00
The Mobile and North-Western, per mile	150 00
And all other railroads constructed or to be constructed, per mile	100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first

rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed; and provided further, that if any railroad shall fail to pay the privilege tax required by law, and within the time provided by law, the same shall be assessed for taxation, and shall pay the *ad valorem* taxes levied for the year of such failure; and all the provisions of Section two, three, four and five of the Act entitled "An Act to provide for the assessment and collection of past due and unpaid taxes on railroads which have escaped the payment thereof," approved April 3, 1888, shall apply in full force in all such cases; said section two of said Act being amended by striking out the words "sixty days after the passage of this Act," in lines one and two, and by striking out the words "which said railroad has failed to avail itself of the provisions of the first section of this Act and paid taxes according thereto," in lines three, four, five, six and seven, and also by striking out the word "next" after the words "June and July" in lines twenty-two and twenty-four, respectively, and said sections of said Act as amended are hereby re-enacted.

SEC. 6. This Act shall take effect on its passage.

Approved February 24th, 1890.

Section 3379, Chapter 108, Annotated Code of 1892.

3379. *Railroads—*

Railroads are divided into four classes: First, second, third, and narrow-gauge, and privilege taxes are levied on them as follows:

On each railroad of first class, per mile	$20 00
On the second class	15 00
On the third class	10 00
On narrow gauge class	2 00

The Railroad Commission shall, annually, on or before the

first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on, or before the first day of December.

Section 3875, Chapter 116, Page 860, Annotated Code of 1892.

3875. *Assessment and Taxation of Railroads; Each Company to File Schedule.*—Each railroad company owning and operating a railroad, shall, on or before the first Monday in April in each year, file with the Railroad Commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches and side-tracks, and showing how many miles or fractions thereof lie in this State, and in each county of the State, and in each city, town or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value and the value of its franchise; the number of engines and their respective values; the gross amount of receipts in the year preceding; the number of cars of all kinds, their classes and value; the number of depot-buildings and warehouse and other buildings; in what county and city, town, village or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county, and city, town, village, or levee district, located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company within the State, not enumerated, with its value; the number of bridges and ferries in this State, in what county, city, town, village, or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this State owned, describing the same, and giving the location and value thereof,

the quantity of land used for depots and machine shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this State; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

Section 3877, Chapter 116, Page 861, Annotated Code of 1892.

SECTION 3877. *The Same; State Railroad Assessors.* The members of the Railroad Commission are constituted State railroad assessors, and they shall, upon the receipt or making and completion of the schedules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property "*liable to taxation in the State,*" affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this State; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this State.

Section 3744, Chapter 116, Page 830, Annotated Code of 1892.

3744. *What Property Exempt.*—The following property, and no other, shall be exempt from taxation, to-wit:

(a) All cemeteries used exclusively for burial purposes.

(b) All property, real or personal, belonging to the United States.

(c) All property, real or personal, belonging to this State, or to any county or municipal corporation thereof.

(d) All property, real or personal, belonging to any religious or charitable society, or incorporated institution for the education of youth, used exclusively for the purpose of such society or institution, and not for profit.

(e) All property, real or personal, held and occupied by the trustees of schools, and school-lands of the respective townships for the use of public schools.

(f) Property appropriated to and occupied and used for any hospital or charitable institution.

(g) Wearing apparel of every person, not including jewelry or watches.

(h) Provisions on hand necessary for family consumption.

(i) All farm products, raised in this State, in the hands of the producer.

(j) One gun (for each owner) kept in private use.

(k) All poultry.

(l) Household furniture not to exceed two hundred and fifty dollars in value.

(m) Two cows and calves.

(n) Ten head of sheep or goats.

(o) All colts, foaled in this State, under three years old.

(p) Farming implements used for agricultural purposes.

(q) All property of agricultural and mechanical associations and of fairs used for promoting their objects.

(r) The libraries of all persons.

(s) All pictures and works of art not kept or offered for sale as merchandise.

(t) The tools of any mechanic necessary for carrying on his trade.

(u) Ten head of hogs; and

(v) All permanent factories hereafter established in this State before the first day of January, 1900, for working cotton, jute, ramie, wool, silk, furs, metals, and all other manufacturing implements or articles of use in a finished state shall be exempt from taxation for a period of ten years. Any factory which has been abandoned for not less than three years, and commencing operations within two years from November 1st, 1896, shall be entitled to such exemption. A corporation, or person claiming exemption under this paragraph (v) shall apply in writing to the

Auditor of Public Accounts, giving full information as to the property proposed to be exempted, the kind of articles to be manufactured; and the Auditor, with the written advice of the Attorney General, shall determine whether the property is exempt. The Auditor shall notify the assessor of the county or municipality, in writing, of his decision in the premises, stating distinctly the property to be exempted and the date when the exemption begins and ends. A factory or manufactory belonging to or being a trust, combine, or pool, shall not enjoy exemption from taxation.

E

MISSISSIPPI CONSTITUTION 1869.

Article XII., Section 13.—The property of all corporations, for pecuniary profit, shall be subject to taxation, the same as that of individuals.

Article XII., Section 20.—Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law.

MISSISSIPPI CONSTITUTION 1890.

Section 181.—"The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature. And domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this state, except to the extent of the excess of their *ad valorem* tax over the privilege tax imposed upon such foreign companies; and the legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate."

Office Supreme Court U.S.
FILED
FEB 27 1901
JAMES H. McKENNEY,
Clerk

No. 81.

Brf. of Critz & Beckett for D.

Filed Feb. 27, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 81.

THE GULF AND SHIP ISLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

FRANK A. CRITZ,
R. C. BECKETT,
Attorneys for Defendant in Error.

(17,441.)

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vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is another of the Mississippi tax suits.

It is an injunction bill filed against Georges P. Hewes, the sheriff and tax collector of Harrison county.

The original bill was divided into seven paragraphs.

Paragraph 1 sets up that a charter was granted the Gulf and Ship Island Railroad Company (hereafter called the

railroad company) on February 23, 1882, in Laws of 1882, pages 849–862.

Paragraph 2 quotes section 18 of said charter as follows:

"Be it further enacted, That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as a consideration and inducement therefor, the taxes and burdens which the State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads, and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act."

Record, p. 2.

Paragraph 3 charges that under said section 18 the railroad company was exempt till February 23, 1902.

Paragraph 4 states that, acting under this charter, a part of the railroad was built from Gulfport, in Harrison county, to Hattiesburg, in Perry county, a distance of 70.22 miles, and in November, 1896, a four-mile branch was built to Handsboro.

Paragraph 5 states that this exemption has never been repealed, but that the Mississippi railroad commission has assessed the property for taxation, and said sheriff is demanding the taxes, $250 for privilege taxes and $1,780.95 for State and county taxes.

Paragraph 6 charges that said tax collector threatens to distrain for said taxes.

Paragraph 7 states that said taxes are illegally demanded, and that an injunction is necessary.

The prayer of the bill is for a temporary injunction, and on the final hearing for a perpetual injunction and for a final decree "that complainant is exempt from taxation on its property, as above described, until the 23d day of February, A. D. 1902."

Record, pp. 2, 3.

The bill was not filed till January 1, 1897, while the injunction was granted on December 28, 1896.

Record, p. 4.

See 1st Smith's Chancery Practice, marg. p. 586.

A demurrer to this bill was filed on February 2, 1897, with only four grounds, claiming—

1st. No equity.

2d. That the bill shows no cause for relief, either in law or equity.

3d. That said section 18 of the charter was a mere gratuity, affording no protection after its repeal.

4th. That the claim of exemption under Acts of 1882, page 861, section 18, was not warranted, permitted, or protected, "the same having been repealed."

Record, p. 6.

The case was taken under advisement to be decided in vacation, and on September 13, 1897, the demurrer was sustained and leave granted to file an amended bill within twenty days.

Record, pp. 7 and 8.

The amendment was filed on September 20th and the demurrer refiled, by consent, on September 27, 1897.

Record, pp. 7, 9, 10.

There was a bill of exceptions to the granting of leave to file this amended bill.

Record, p. 10.

This amendment set up that the said tax collector and also the board of supervisors of the county claimed that the exemption was repealed by the provisions of the Annotated Code of 1892, but the complainant asserted that this was untrue, and also that under section 10, article 1, of the Constitution of the United States it was not within the power of the State to repeal it.

Record, pp. 8, 9.

The chancellor sustained the refiled demurrer and dismissed the amended bill, and an appeal was taken, all on February 10, 1898.

Record, p. 11.

After the case got to the State supreme court there was a written agreement between the parties, made with the written endorsement of the chancellor, filed on April 15, 1899, to the effect that the charter was received and the railroad built in reliance on the case of Mississippi Mills *vs.* Cook, 56 Miss., 40.

Record, p. 14.

The supreme court simply entered a decree of affirmance on May 8, 1899, without rendering any opinion.

Record, p. 15.

The assignment of errors in that court was composed of a single ground—that the chancery court had erred in sustaining the demurrer and dismissing the bill.

Record, pp. 14, 15.

But the Chief Justice, in granting the writ of error in this case, certified to two things:

1st. That the validity of legislation subsequent to said statute of February 23, 1882, was drawn in question as repugnant to section 10, article 1, of the Constitution of the United States, and the validity sustained.

2d. That the validity of statutes in the Annotated Code of 1892 providing for the taxation of railroads was drawn in question as repugnant to the United States Constitution and the fourteenth amendment thereto, as denying the equal protection of the laws, and the validity sustained.

Record, pp. 17, 18.

There are four grounds in the assignment of errors in this court.

The first two reiterate the two grounds certified by the Chief Justice.

The third is that the decree of the supreme court is in favor of an authority exercised by the chancery court which was repugnant to said section 10, article 1.

The fourth is that said decree is in favor of an authority exercised by said tax collector in attempting to deprive of property without due process of law.

Record, p. 22.

NOTE.—This is the first time this fourth ground has been set up or appears anywhere else in the suit, and the second ground in the certificate of the Chief Justice appears nowhere else in the suit.

BRIEF.

This brief is intended as an argument on the jurisdiction of the court on the claim that this is a delay case, proper for damages, and on the merits.

The gist and gravamen of the whole case is centered on one single finding or fact, and that is, that the exemption in controversy was repealed by "the provisions of the Annotated Code of 1892."

This may raise two points, but we think it can properly only raise one. These are:

1st. Whether such repeal raises any Federal question in this case.

2d. If it does, that question is: Was it within the power of the legislature to make the repeal?

These two points are so intimately connected that they may well be argued together.

Now, first, let us get clearly and definitely at what was decided, and what question is before this court.

Paragraph 5 of the original bill states that the exemption has not been repealed, but claims no protection from the Federal Constitution.

Record, p. 3.

The third and fourth grounds of demurrer aver that the exemption is not warranted, permitted, or protected, because it has been repealed.

Record, p. 6.

On sustaining this demurrer the chancellor granted leave to file an amended bill. In this amendment two things, and only two, are set up: First, that it is claimed by the tax collector, and also by the board of supervisors of Harrison county, that the exemption has been repealed by the provisions of the Annotated Code of 1892, which complainant "avers is utterly untrue;" and, second, that the exemption is a contract protected by section 10, article 1, of the Constitution of the United States, and "it is not in the power of the State of Mississippi to repeal the said exemption from taxation."

Record, pp. 8, 9.

The same demurrer was refiled to the bill as thus amended, which was again sustained and bill dismissed and an appeal taken.

In the supreme court a written agreement was filed, with the consent and endorsement of the chancellor, to the effect "that said Gulf and Ship Island Railroad Company was chartered and constructed after the decision of the supreme court of the State of Mississippi in the case of The Mississippi Mills *vs.* Cook, 56 Miss., page 40, and that the incorporators and stockholders invested their money in said enterprise, relying upon the adjudication of the supreme court of Mississippi in said cause as the law."

Record, p. 14.

The assignment of errors simply stated that the court below erred in sustaining the demurrer and dismissing the bill.

Record, p. 14.

And the supreme court simply affirmed the decree of the court below, and rendered no opinion.

Now, we submit to this court that the status of the case here, from the foregoing recitals, is that the complainant railroad company first in its original bill charged that the exemption had not been repealed, and then in its amendment averred that the tax collector and board of supervisors were acting on the assertion that it had been repealed by the provisions of the Annotated Code of 1892, which complainant averred was not true, and then further averred that it was not in the power of the State to repeal it, it being protected by section 10, article 1, of the Constitution of the United States, and then by a further agreement made and filed in the State supreme court before the hearing there it was agreed that the charter was received and road built after and in reliance on the Mississippi Mills case.

The amendment to the bill sets up that the claim of the tax collector is that the exemption had been repealed by the Annotated Code of 1892, and the fourth ground of the refiled demurrer is that the exemption is not permitted because the same has been repealed.

The Annotated Code of 1892 consists, of course, of the general and public laws of the State, of which the courts take judicial notice.

Hence the only question and controversy is thus sharply defined and is a question of law and of judicial cognizance, and that is, first, whether the exemption was repealed by the Code of 1892, and, second, whether, if this be true, the State had the power to repeal it.

Now, if the State had the patent and undisputed power to repeal it, then the other question, as to whether it has in

fact been repealed, is a question of local law and policy and devoid of any Federal features.

Let us examine, then, first, the power of the legislature at the time this charter was granted on February 23, 1882.

Sections 13 and 20, article 12, of the Mississippi constitution of 1869, in force at the time, were as follows:

"SEC. 13. The property of all corporations for pecuniary profits, shall be subject to taxation, the same as that of individuals."

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Mississippi Mills *vs.* Cook, 56 Miss., 50, 51.

This court in four concurring opinions, and all of the States where the question has arisen, except the State of Mississippi, have held that the same or similar constitutional provisions rendered it impossible for the legislature to grant exemptions. In this respect the constitution of Mississippi is a copy of the Iowa constitution. That this is so, see—

Mississippi Mills *vs.* Cook, 56 Miss., 53.

That this court and all other courts, except that of Mississippi, hold this to be a constitutional interdiction against exemptions, see the opinion, where the cases are collected, in Adams *vs.* Railroad Co., 77 Miss., 254, 274, 275.

And in that case the court says that, on the particular holding, the case of Mississippi Mills *vs.* Cook stands "*absolutely alone.*"

77 Miss., 278.

The court further decides that the Mississippi Mills case cannot be used as *stare decisis*, because the exemption passed

on in that case was to all factories thereafter built, of a certain class, while the exemption in controversy there was to a single railroad corporation by name, and that such kind of exemption was prohibited by the above-quoted provisions of the constitution of 1869.

77 Miss., 278–289.

And this court has not only followed the same rule as to *stare decisis*, as shown in said opinion, but has gone the length of holding that, where the claim of exemption is not the same, a decision against its validity raises no Federal question.

77 Miss., 278.

Wood *vs.* Brady, 150 U. S., 20–22.

We are not quoting the foregoing opinions and decisions in order to show that the exemption in this case was incipiently unconstitutional and void. No such question is either raised or decided in this case and no such question is before this court in this case.

We simply do this to show this court plainly that the Mississippi court in the Mississippi Mills case gave to corporations the most *favorable construction* that has ever been anywhere known in the English-speaking world. We are not intimately acquainted with the laws of other nations.

Then what does the Mississippi Mills case decide? It is solemnly agreed by a written instrument filed in the State supreme court that the railroad company was chartered and road constructed *after and in reliance on the Mississippi Mills decision.*

Record, p. 14.

Now, the facts are that the Mississippi mills was built under the act of April 17, 1873, amending the factory act of April 1, 1872, and in 1877 the legislature passed an act partially repealing the exemptions granted to factories in said act of 1872.

Mississippi Mills *vs.* Cook, 56 Miss., 42–45.

The tax collector was attempting to collect the taxes under this repealing act of 1877, and was enjoined on the express ground that the repealing act "impaired the obligation of such contract, and was in violation of the Constitution of the United States."

56 Miss., 45.

The court sustained the repealing act and held that under said sections of the constitution of 1869 the contract of exemption was repealable, and that the legislature could, at any time, repeal it, and could not make it irrepealable, and the repealing act was sustained and upheld. The sections are quoted in full (56 Miss., 50, 51), and Judge Campbell says these sections are mandatory as to the liability to taxation, "shall always be liable to be taxed," "cannot be placed beyond the reach of the taxing power."

56 Miss., pp. 52–55.

Judge Simrall says there must be a "*continuous* subjectibility to taxation." "If the exemption is granted in the form of a contract in the charter, that is prohibited."

56 Miss., pp. 61, 62.

So if anything is certain it is certain that the Mississippi Mills case, both in its actual facts and in the decisions and

decree, established, beyond all chance for doubt or cavil, that the legislature had power to repeal an exemption granted to a corporation under the constitution of 1869. This has never been doubted, denied, or controverted in the State. In the late case No. 35, October term, 1900, here, there was some attempt made to discriminate between an exemption and an appropriation of taxes, which gave this court jurisdiction, but the thing in this case is in the form of an exemption pure and simple (see Record, p. 2), and no one, anywhere, so far as we know or have ever heard, has ever contended that the Mississippi Mills case did not establish the doctrine that all *exemptions* of corporations for pecuniary profits were necessarily repealable at the will and pleasure of the legislature.

The taxes involved in this case are not *back taxes*, and there is nothing retrospective attempted, but it is the taxes of the current year 1896, and the case here involves the simple question of the power of the legislature to repeal exemptions to corporations for pecuniary profits, unencumbered with any other question whatever.

As we said before, the Mississippi Mills case settles this power beyond controversy, and the solemn written agreement is that the charter was accepted and road built in reliance on the Mississippi Mills case.

Hence it is plain that this court has no jurisdiction, for the simple and plain reason that if the legislature did not repeal it, it didn't, and if it did, it had the right to do it.

Under ordinary circumstances, if the question was *res nova*, this court would take jurisdiction in order to decide whether the repeal of the exemption violated the obligation of the contract; but there is no color for such jurisdic-

tion when the supreme court has already decided that the exemption was repealable, and that in the Mississippi Mills case, in 1878, when the charter in this case was granted on February 23, 1882, and by a solemn written agreement it is admitted that the charter was accepted and road built on the faith of the Mississippi Mills case. What is this court to do? Decide that the Mississippi Mills decision is erroneous? If it does, it must ignore and repudiate the written agreement on which all parties have in open court agreed to stand.

Besides, if this court could do such a thing as that, it must then follow its own decisions and the late decision of the supreme court of Mississippi in the case corresponding to No. 35, October term, 1900, here, reported in 77 Miss., 270–289, and hold that the exemption was void *ab initio*, and we do not suppose there could be found a lawyer anywhere, and certainly no lawyer entitled to be enrolled among the members of the bar of this court, who would seriously contend that the legislature could not repeal a void *ab initio* exemption.

And so it is that all roads lead to Rome, to the right of the State to repeal.

We especially call attention to the fact that in the Mississippi Mills case the protection of the Federal Constitution was expressly claimed, and that the decision establishes the fact that the repeal was valid under it also, and the railroad company agrees to stand on that.

The question of the original invalidity of the exemption is not in issue in this case, has never been made an issue, has never been passed on, is not in either the assignment of errors in the State court or the certificate of its Chief Jus-

tice, nor in the assignment of errors in this court. The gage of battle tendered by the railroad company was accepted by the State, and the battle in this case has been waged and fought out to the end on the proposition that the exemption was repealed by "the provisions of the Annotated Code of 1892," and with the railroad company asserting that this was not true, and claiming that the State had no power to repeal it, with a written agreement that the charter was accepted and road built in reliance on the Mississippi Mills case.

With the first question, as to whether it had been repealed by the Annotated Code of 1892, that is a question of local law and policy with which this court has nothing to do. As to the question of local policy, this court, in the concluding part of its opinion, by Mr. Justice Brown, in No. 35 of the present term, delivered on January 7, 1901, has stated the position of this court in such scholarly and conclusive language that we can add nothing to it. As to the question of local law, this court has so often decided that the supreme court of a State has the absolute right to construe its own constitution and laws on writs of error to the State court that there is no longer room for controversy on this point.

To save space, it is only necessary to refer to the last reported decisions of this court on this point. They are Avery *vs.* Popper, 179 U. S., 305, 315; Board, &c., *vs.* Louisiana, 179 U. S., 636.

In view of this fact, it would seem rather a work of supererogation to refer this court to the recent previous decision of the supreme court of Mississippi in R. R. Co. *vs.* Adams, 77 Miss., 291–293, where it is distinctly held that all railroad exemptions were repealed by sections 3379, 3744,

and 3875–3884 of the Annotated Code of 1892, to which we might add section 3803.

The decision is that the exemption in this case (whether originally void or valid) has been repealed by said provisions of the Annotated Code of 1892.

The only question before this court is, did the State have power to repeal it?

This would clearly present a Federal question if it was *res nova*. The point we make is that it is not *res nova*, and that the railroad company is effectually estopped to claim that it is *res nova* by their solemn admission and agreement that the charter was accepted and road built in reliance on the Mississippi Mills case. All parties agreed to stand on that proposition, and that deprives this court of jurisdiction.

The Mississippi supreme court has since frequently construed the Mississippi Mills case as holding all railroad or corporation exemptions to be repealable.

Attala Co. *vs.* Kelly, 68 Miss., 44.

Railroad Co. *vs.* Lambert, 70 Miss., 786, 787.

In the Attala County case the exemption was repealed, and repeal sustained, and in the Lambert case the exemption was repealed by the Code of 1880 and repeal sustained, the court holding that it was restored by the act of 1884; and that suit being for the taxes of 1891 and 1892, no question was raised or made as to a repeal by the Annotated Code of 1892.

The Mississippi Mills case decided that exemptions were repealable, and the Mississippi supreme court has several times decided that the Mississippi Mills case did hold that

exemptions were repealable. That can be seen with the eyes of a normal person, and read by a blind man with his fingers. Hence it has no color.

It has been so often decided by this court that in order to confer jurisdiction the defense must be made in good faith and present a *bona fide* color of truth and right that it is needless to refer to authorities. They are legion.

Hence we say this case does not present a *bona fide* color of a Federal question or defense, and should be dismissed for want of jurisdiction.

But if the court sees proper to take jurisdiction, it should at least be affirmed and damages awarded as for a delay case, for it is certain that the Mississippi Mills case decided that exemptions were repealable, and that under the pleadings and agreement the Mississippi Mills case is expressly accepted as the law of this case as to the question of the repealability of the exemption.

It is expressly decided by this court that a grant of exemption for twenty or any named number of years is not an agreement not to repeal it within that time, under the rule of *strictissimi juris*, as against exemptions.

Citizens' Sav. Bk. *vs.* Owensboro, 173 U. S., 650.

Louisville *vs.* Bk. of Louisville, 174 U. S., 443, 444.

The evident reason why the State supreme court did not render an opinion was because this case was continued there, by consent, from time to time, awaiting a decision in what was termed the main case, No. 35, October term, 1900, here. This case there was, on April 12, 1898, continued by consent till the October term, 1898. By an agreement filed January 31, 1899, it was again continued till the March

term, 1899, and decided on May 8, 1899, the assignment of errors being filed on April 21, 1899 (Record, pp. 13–15).

In said main case the summary of holdings was handed down on June 20, 1898, and full opinion filed November 22, 1898 (Adams *vs.* Railroad Co., 77 Miss., 205), and opinion on the second appeal delivered on February 20, 1899, as will be seen from the record of that case in this court.

We make these remarks simply to show that this case was continued along to await the decisions in that case, and the court in that case, having decided (77 Miss., pp. 289–293, affirmed on the second appeal, pp. 315–319) that charter exemptions were repealed by the provisions of the Annotated Code of 1892, did not find it necessary to render an opinion in this case, which would have been one of simple reiteration.

Section 181 of the constitution of 1890 has no effect here, it simply providing that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

And this exemption was "*sooner repealed*" by the Annotated Code of 1892.

Hence we ask this court to dismiss, or, if that cannot be done, to affirm with damages as a delay case, or take such action as is legal and proper under the laws and decisions of Mississippi.

FRANK A. CRITZ,
R. C. BECKETT,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 5.

THE GULF AND SHIP ISLAND RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR IN ANSWER TO BRIEF FOR PLAINTIFF IN ERROR, FILED OCTOBER 4, 1901.

There is a full but succinct statement of the case in our original brief, filed with the motions to dismiss or affirm, and also a general argument, to which we invite the attention of the court.

We shall confine ourselves in this reply brief mainly to a single point, and in the argument of this point will meet the views put forward by opposite counsel.

Those that are not so met we will notice here separately.

It seems that the plaintiff in error has new counsel em-

ployed, or, at least, that this case is now being attempted to be pressed on grounds that were not advanced or passed on in the lower courts; and in the course of this brief we will endeavor to show that this is not admissible.

For instance, it is now brought forward for the first time that the charter in controversy is in some sort an amendment or continuation of an old charter passed in 1854, but to this contention there are several answers:

First. The bill in this case claims under the new charter of February 23, 1882, and a party cannot raise a Federal question here not raised in the lower court.

Second. The bill expressly states that the corporation that is suing here was incorporated on February 23, 1882, and that it built the railroad, and that the exemption is claimed under the eighteenth section of its charter.

Record, p. 2.

In his Appendix, pages 2 to 4, plaintiff in error copies an old charter of 1854, and the charter in this case is copied on pages 8 to 10. The exemption in that old charter is in section 11, and the bill in this case makes no reference to it and claims nothing under it. The incorporators in one are totally distinct from those in the other.

Third. The charter of 1882 is an entirely new one, and there is no reference in it to any other charter. It is true that an amendatory act in section 8, copied in their Appendix on pages 13 to 14, gives the company chartered in 1882 "all the rights and privileges heretofore granted by the State of Mississippi to the Gulf and Ship Island Railroad Company, but does not specify which company, and the fatal defect is

that this last act was passed on March 13, 1884, nearly two years after the new Gulf and Ship Island Railroad Company was incorporated; and it is plain that if the legislature in 1882 could not grant an exemption, or an irrepealable exemption, it could not accomplish this result two years after the creation of the new company, by the indirect method of giving it the rights and privileges of another company. This would be as much forbidden by the Constitution of 1869 as an original grant; and if section 18 of its own charter was invalid, section 8 of the amendatory act would be equally so.

Planters' Ins. Co. *vs.* Tenn., 161 U. S., 197, 198.

Fourth. This amendatory act of 1884 only confers "the rights and privileges" of another company, and this is held by this court not to include an exemption from taxation unless the word "immunity" is used, or there be some other indication of an intention to pass an exemption; and certainly it could not be implied that the words "rights and privileges" were here intended to include a short exemption till the road was completed, when section 18 of the charter proper had given a much longer exemption of twenty years.

Phœnix Ins. Co. *vs.* Tenn., 161 U. S., 174, 177–183.

Fifth. There is nothing in the bill to show that the company has not completed all the road it intends to build, or that the old Gulf and Ship Island Railroad Company was ever organized or ever built any railroad, or that that charter was ever accepted or acted on by anybody, and a corporation has no existence till organized; and, besides, section 180 of the constitution of 1890 makes null and void all exist-

ing charters under which organizations have not taken place and work commenced within one year after its adoption. In fact, there is nothing whatever to connect the plaintiff in error, chartered in 1882, with an old obsolete charter enacted in 1854. That whole business seems to be an afterthought injected into the case by the new counsel, and which has no existence in the pleadings or the case, and hence cannot be considered, but is, for reasons above set forth, within itself utterly untenable.

Planters' Ins. Co. *vs.* Tenn., 161 U. S., 197, 198.
Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 253.
1 Morawetz Priv. Corp., § 288.

We think there is one pivotal and vital point on which the case should turn, and we respectfully invite the closest attention and scrutiny of the court to this point.

THE POINT.

It is this: That the issue, and only issue, which was triable under the pleadings, or which was in fact tried or decided, was whether the exemption set up by the plaintiff in error had been repealed; and the point we wish to press is that if this court, *on its own construction* of the contract, shall decide that it was repealable at the will of the legislature, then the further question whether it was in fact repealed or not was a question of local law, over which the State court had exclusive jurisdiction, and over which this court has no jurisdiction, or in which this court, under repeated rulings, is bound by the decision of the State court, and hence must dismiss or affirm.

THE ISSUE.

What was the issue? It must be borne in mind that this was a suit in equity in which the plaintiff in error took the initiative. It filed the bill. Hence the issues are necessarily those made by the bill, *so far as the plaintiff in error is concerned.* If the bill had been filed by the State, and the demurrer by the plaintiff in error, other questions might arise. But the bill was filed by the plaintiff in error to enjoin the collection of the State and county taxes for the year 1896, and the tax collector, the defendant in error here and defendant in the lower court, did not answer, but filed a demurrer, in which it is claimed that the plaintiff in error was not entitled to relief on the showing made in the bill, and the demurrer points out the reasons why the bill is insufficient.

The original bill merely set out the attempt to collect the taxes, the exemption, and prayed for an injunction. There were only four grounds of the demurrer, of which the first two were in general terms, stating that the bill showed no equity or cause for relief, and the third and fourth each claimed that the exemption had been repealed, but without naming any repealing statute.

Record, p. 6.

This demurrer was sustained, and leave granted to amend. In the amendment two additional things were set up. These were that it was claimed by the tax collector and by the board of supervisors of Harrison county "that the said exemption from taxation has been repealed by the provisions of the Annotated Code of 1892;" and then the amendment

proceeds to say, "which said contention complainant now avers is utterly untrue;" and also "that it is not in the power of the State of Mississippi to repeal the said exemption from taxation," and "that to permit the State to repeal its contract of exemption so entered into by it would be a violation of the 10th section of article I of the Constitution of the United States," &c.

Record, pp. 8, 9.

To the bill, as thus amended, the original demurrer was refiled by consent, to save the manual labor of writing it out again.

Record, p. 10.

The demurrer was again sustained and the bill dismissed and an appeal taken to the Supreme Court, but before it was argued, or submitted there, a written agreement was prepared and filed that the appeal was to be heard and determined "as if the bill stated and recited the fact that the said Gulf & Ship Island Railroad Company was chartered and constructed after the decision of the supreme court of the State of Mississippi in the case of The Mississippi Mills *vs.* Cook, 56 Miss., page 40, and that the incorporators and stockholders invested their money in said enterprise relying upon the adjudication of the supreme court of Mississippi in said cause as the law," etc.

Record, p. 14.

The case was affirmed by the Supreme Court without any written opinion.

As we have before said, the initiative was taken by the plaintiff in error. It filed the bill, and there is but one Fed-

eral question anywhere attempted to be raised by the pleadings, and that was the averment in the amendment to the bill that it was claimed by the tax collector that the exemption had been repealed by the provisions of the Annotated Code of 1892, and plaintiff claimed that this was utterly untrue, and also claimed the protection of section 10, article 1, of the Constitution of the United States against the legislative impairment of contracts. By written agreement made and filed in the Supreme Court, as aforesaid, this amendment was to be heard and determined as if it had stated the fact that the charter was accepted and road built on the faith of the Mississippi Mills case "*as the law.*"

Now, let us recite some dates.

The bill was prepared and sworn to on October 21, 1896, and filed January 1, 1897. The amendment was filed September 27, 1897. The final decree was made in the chancery court on February 10, 1898.

Record, pp. 4, 8–9, 11.

As shown by the record in Y. & M. V. R. R. Co. *vs.* Adams, No. 35, October term, 1900, here reported in 77 Miss., 205, 307, and 180 U. S., p. 3, the first opinion holding these railroad exemptions unconstitutional was not rendered till June 20, 1898, and hence, so far as the record in this case discloses, the repeal of the exemption is the only thing that was thought of or contended for in the court below. As shown by the record, we were not of counsel in this case in the State courts.

The agreement to which we have referred was filed in the State supreme court on April 11, 1899, and the final decree rendered May 8, 1899.

Record, pp. 14, 15.

At those dates the Supreme Court had decided, on November 22, 1898, in said case, No. 35 here, that these railroad exemptions were unconstitutional, and this agreement seems to have been intended to interpose the Mississippi Mills case as *stare decisis* between such a holding and the charter exemption; but in trying to avoid Scylla they ran into Charybdis, for the Supreme Court had also decided that, whether the exemption was unconstitutional or not, it was repealable and had been repealed.

Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 13, 14.
Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 289–293, 316–318.

We simply call the attention of the court to these things to show that, as a matter of fact, while the Supreme Court might have based, and very probably did base, its simple decree of affirmance on the authority of said previous decision of November 22, 1898, embracing both the unconstitutionality and the repeal of the exemption, still, as this case was framed and decided in the lower court, there was nothing involved by the pleadings, except the repeal of the exemption, and no provision of the Federal Constitution was ever invoked or thought of except that against the impairment of contracts by reason of such repeal. As the plaintiff took the initiative, he made his own bed and, Procrustean though it be, he must lie on it, since in such cases a party can only have the benefit of such Federal questions as he himself raises. They cannot be raised for him by the other party.

Sully *vs.* American Nat. Bk., 178 U. S., 297.
De Lamar, &c., *vs.* Nesbitt, 177 U. S., 528.

In a contention as to the impairment of a contract, however, it is the custom and practice of this court to make its own independent construction of the contract and its obligations, and it is probable that it ought to and will take into consideration the constitutionality of and all laws entering into the contract in order to determine whether such a contract as is claimed in fact existed, because it has laid down the rule that before the Federal prohibition against the impairment of the contracts can be invoked it must first be shown that there is such a contract as is subject to impairment in the manner claimed; and if the alleged contract was either void for unconstitutionality or repealable, then there is no such contract as is subject to impairment by subjecting the property to taxation.

New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 88.

There was but one assignment of error in the Supreme Court, and that was that the court below "erred in sustaining the demurrer and dismissing the bill."

Record, p. 14.

We deny that there is any such practice as only assigning one error on a demurrer in the Supreme Court, as claimed by opposite counsel. We never stopped with one.

In his certificate the Chief Justice certifies that upon the argument and hearing section 10 of article 1 of the Constitution of the United States, against the impairment of the obligation of contracts, was in issue, and also that "statutes of the State of Mississippi in the Annotated Code of 1892, providing for the taxation of railroads, were drawn in ques-

tion" as "repugnant to the Constitution of the United States, and the 14th amendment thereto, in that in and by said statutes the State of Mississippi denies to the said Gulf & Ship Island Railroad Company within its jurisdiction the equal protection of the laws," &c.

This certificate as to this last assertion is fatally defective both because it does not point out what statute or in what manner the plaintiff in error was denied the equal protection of the laws, and for the further reason that it is not in fact borne out by anything in the record. For both of these reasons it should be disregarded.

Yazoo, &c., R. R. Co. *vs.* Adams, 180 U. S., 48, 49.
Henkel *vs.* Cincinnati, 177 U. S., 170, 171.
Lawler *vs.* Walker, 14 How., 149.

It is impossible for this court to tell, either from this certificate or from the record, what particular statute denied or in what way the plaintiff in error ever claimed to be denied the equal protection of the laws. It would be a novel doctrine to hold that a man was denied the equal protection of the laws because his property was subjected to taxation equally and in common with that of his fellow-citizens.

If it refers to the method of assessment, it has been so often and so deliberately decided that a method of assessment like that here violates no provision of the Federal Constitution that we cannot conceive that either the Chief Justice or the learned counsel on the other side referred to that. What does it mean? We are lost in the unsurveyed wilds of conjecture. Possibly opposite counsel can explain it in their briefs or oral argument, if cases on writ of error

to a State court can be tried here in that way. We thought this court tried that class of cases *on the record*. It surely cannot refer to the method, either under the State or Federal Constitution.

Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 775 to 779, and Federal cases cited.

Also Kentucky Railroad Tax Cases, 115 U. S., 321.

Weyerhaueser *vs.* Minnesota, 176 U. S., 557, 558.

New York State *vs.* Barber, 179 U. S., 279.

Mallett *vs.* North Carolina, 181 U. S., 597–599.

In passing, we would call the attention of the court to the fact that, so far as the privilege taxes are concerned, the privilege tax in this case was levied by the act of March 17, 1896, and not by the Code of 1892.

Laws of 1896, pp. 31–54, 44, 45.

The concluding section of this act of 1896, page 54, repeals chapter 108, which is the privilege-tax law in the Code of 1892, embracing section 3379, which fixes the privilege tax on railroads.

This would apparently repeal all privilege taxes prior to 1896 which had not been paid; but the privilege tax in controversy here is for the year 1896, and due December 1, 1896, and hence is that levied by this act of March 17, 1896.

Now, the amendment to the bill, as above shown, claims that the repeal by the provisions of the Annotated Code of 1892 impairs the obligation of the contract. This act of 1896 subjects all railroads in the State to a privilege tax without exception or qualification, and there can be no doubt that it embraces the railroad in controversy here.

In another case before this court where the party claimed the protection of the 7th amendment, when he should have claimed under the 14th, one of the judges thought he ought to have the benefit of good intentions, but the court declined to do for the party what he had mistakenly or inadvertently failed to do for himself, although admitting it was a hardship. This court cannot correct mistakes. It cannot assist the negligent or the unfortunate. A certain place is said to be paved with good intentions. We are all liable to err, and however hard it may appear, yet inexorable nature refuses to take the will for the deed, and we must suffer equally as if we had deliberately and knowingly committed the error or the deed.

Chapin *vs.* Fye, 179 U. S., 127, 130.

We say, therefore, that so far as the privilege tax is concerned this court must dismiss for want of jurisdiction, as it is distinct and severable from the *ad valorem* taxes. This is a small matter, and, as the *ad valorem* taxes must still rest on the Code of 1892, we would not even call the attention of the court to it, except that we consider it our duty as members of the bar of this court to do so in order that the court may not be placed in the position of basing its decision on untrue grounds.

At the same time we wish to guard the court against making any deliverance as to the effect of the repeal of chapter 108 on the taxes prior to 1896, not involved in this suit, as there are other cases pending in the State courts. This court holds that where one act is repealed, and another to the same effect passed at the same time, *uno flatu*, one is regarded simply as a continuance or modification of the

other as to precedent rights, and does not repeal existing obligations.

Steamship Co. *vs.* Joliffe, 2 Wall., 450.

And this would be the case under section 61 of the Mississippi constitution of 1890 (see Code of 1892, bottom page 53), which requires that when an amendment to a statute or section of a statute is made, the entire statute or section, with the proposed amendment, shall be copied or re-enacted, thus guarding against secret or vicious legislation. That requirement is followed in this case, and the substitute is in the nature of an amendment. Some privilege taxes are added and some changed, but there is no change as to railroads. At any rate, under the principle above quoted, and especially under section 100 of said constitution of 1890, the repealing clause would be ineffectual, so far as any existing liability for taxes is concerned. It is as follows:

"SECTION 100. No obligation or liability of any person, association or corporation, held or owned by this State, or levee board, or any county, city or town thereof shall ever be remitted, released, or postponed, or in any way diminished by the legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged, or transferred except upon payment of its face value," etc.

See Code 1892, bottom page 58.

In this privilege-tax matter counsel on the other side seem not to agree amongst themselves. In the brief of Mr. Eaton J. Bowers, filed on April 11, 1901, in opposition to our motion to dismiss or affirm, on page 19 he states:

"It has never been seriously contended by any of the rail-

roads enjoying exemptions, that they were not subject to this license charge for the right to do business."

This is the view held by some of the authorities.

Cooley on Tax, pp. 205, 206, and authorities cited in n. 2.

But in their present brief, filed October 4, 1901, pages 52, 53, they try to repudiate this, and argue that the exemption is irrepealable because an occupation is not property, and the constitution of 1869 says the *property* of corporations, &c.

A man cannot be deprived of life, liberty, or property without due process of law, and this court expressly holds that the right to do business is property.

Wilmington *vs.* Reid, 13 Wall., 264, 268.

One thing is certain, and that is: If it is not property, then there was no exemption in the first instance, as held by the Louisiana court, *supra*, and if it is property, then the exemption was prohibited both by sections 13 and 20 of article 12 of constitution of 1869. Privilege taxes must be placed on all of a class equally.

Holberg *vs.* Macon, 55 Miss., 114, 115.

You could just as well tax one merchant and exempt another about to commence a competing business.

Now, these are the facts, and the point we wish to impress on this court is that under the Mississippi law and practice, which we presume is not at all unique in this respect, a

party is bound by the allegations in his pleadings, and also by his written agreements made and filed in the cause.

Morgan *vs.* Reading, 3 S. & M. (11th Miss.), 396, 397.
Parkhurst *vs.* McGraw, 2 Cushman (24 Miss.), 134–136.

Under this agreement both sides, the plaintiff in error by his bill and the defendant by his demurrer (the agreement being considered a part of the bill), have agreed to stand on the proposition that the charter in this case was accepted and road built on the faith of the Mississippi Mills case "as the law," and the exact point we wish to urge is that if this court, in looking into the Mississippi Mills case, shall determine either that the charter exemption in this case was unconstitutional or that it was repealable, then under either view it becomes a closed incident, so far as this court is concerned, and you can proceed no further, for then the question as to whether it had in fact been repealed becomes one of exclusive jurisdiction in the State court, and necessarily so, as its decision the one way or the other would violate no provision of the Federal Constitution.

We think the court would arrive at the same conclusion, whether the agreement had been made or not, as a party is bound to act on the faith of the decisions of the highest court of his State, whether he agrees in writing to do so or not; but the particular distinction here is that in the one case this court will dismiss, as we will try to show hereafter, and in the other it might affirm if a sufficient color of a Federal question was made to appear.

We think this case turns on a single principle, and in order to arrive at a correct solution it is necessary to thor-

oughly apprehend, distinguish, and apply the proper one of the following three rules, all of which have been authoritatively announced and settled by this court as the law of its jurisdiction:

JURISDICTION.

1st. That in a case coming here from the lower Federal courts, this court, when it once acquires jurisdiction, has power to decide all issues properly presented by the pleadings and record.

2d. That on a writ of error to the highest court of a State the jurisdiction of this court is by law limited to Federal questions, and such Federal questions only as were presented to and necessarily embraced in the decision of the State court.

3d. That on a writ of error to the highest court of a State, where its decision is based on two or more grounds, one or more of which is or are non-Federal and sufficient to dispose of the case, no jurisdiction can attach here.

The first rule is illustrated by the cases of Carroll County *vs.* Smith, 111 U. S., 556, a Mississippi case, and the cases of—

Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
Avery *vs.* Popper, 179 U. S., 305, 315.

The third rule is illustrated by the cases of—

Lowry *vs.* Silver City, &c., 179 U. S., 198.
Pittsburgh *vs.* Cleveland, 178 U. S., 279, 280.
Eustis *vs.* Bolles, 150 U. S., 361, and intermediate cases.

We think this case falls within and must be decided under the second rule, which embraces two propositions:

1. That only Federal questions can be considered.

2. And only such Federal questions as were necessarily decided in the lower court.

FIRST PROPOSITION.

In the case of Avery *vs.* Popper, 179 U. S., 315, where the supreme court of Texas in construing its laws had overruled some of its former opinions, this court says:

"This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involved no Federal element, it is equally binding in this proceeding, since only Federal rights are capable of being raised upon writs of error to State courts. Conceding that if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a State court, whose opinion upon a question of general law is not reviewable here."

In another case, in concluding the opinion, the court says:

"Upon these facts we are compelled to hold that we are confined to a discussion of the only Federal question which this record presents."

Dewey *vs.* Des Moines, 173 U. S., 200, 201.

Again:

"We are confined then to the only Federal question which this record presents."

Keokuk *vs.* Hamilton, &c., 175 U. S., 635.

And—

"These are the only questions of a Federal nature which are presented by the record, and finding no error in them, the judgment of the supreme court of Nebraska is affirmed."

W. U. Tel. Co. *vs.* Call Pub. Co., 181 U. S., 92, 104.

"While in their briefs many matters are discussed with fullness and elaboration by counsel for plaintiff in error, we are of opinion that those of a Federal nature involved in this record are few in number, and practically determined by previous decisions of this court. Of course, all questions arising under the constitution and laws of Kansas are, for the purposes of this case, foreclosed by the decisions of the State courts (Turner *vs.* Wilkes County Commissioners, 173 U. S. 461; Brown *vs.* New Jersey, 175 U. S., 172, and cases cited in opinion)."

Erb *vs.* Morasch, 177 U. S., 584, 585.

SECOND PROPOSITION.

ONLY SUCH FEDERAL QUESTIONS AS WERE RAISED IN THE COURT BELOW.

This is first decided in Dewey *vs.* Des Moines, 173 U. S., 198–200.

In another case the eighth and ninth assignments of error related to Federal questions not raised in the lower court, and this court said:

"We therefore decline to review the errors alleged in the 8th and 9th assignments."

Citizens' Sav. Bk. *vs.* Owensboro, 173 U. S., 642–644.

In another case it is said:

"In Dewey *vs.* Des Moines, 173 U. S., 193, it was held that where a Federal question is raised in the State courts, the

party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in the court below."

Keokuk *vs.* Hamilton, &c., 175 U. S., 633.

Again:

"But we are not at liberty to consider other constitutional questions, which might have been involved if they had been properly set up and claimed. The observations of this court in Dewey *vs.* Des Moines, 173 U. S., 193, are conclusive against our consideration of this question."

Bolnn *vs.* Nebraska, 176 U. S., 83, 92.

Where a Federal question is raised in the State court, the party who brings the case here cannot raise another Federal question which was not raised below.

Chapin *vs.* Fye, 179 U. S., 127.

THE POINT IN THIS CASE.

Upon the facts, then, keeping these rules in mind, the pivotal point in this case is, did the repeal of the exemption impair the obligation of the charter contract, and this reduces the case to the ultimate, whether the exemption was repealable, for if it was, then this court can go no farther, since the further question as to whether it was repealed becomes one of local law in which the decision of the State court is controlling and binding on this court.

It has been universally held that where the controversy is the construction of a State statute or local law and its decision the one way or the other would violate no provision of the Federal Constitution, then, on a writ of error to the

State court, its decision and construction is conclusive on this court.

Simon *vs.* Craft, 182 U. S., 437.
Lombard *vs.* West Chicago, &c., 181 U. S., 42–45.
St. Paul, &c., *vs.* St. Paul, 181 U. S., concluding paragraph on page 151.
Hale *vs.* Lewis, 181 U. S., 480.
Y. & M. V. R. R. Co. *vs.* Adams, 181 U. S., 583.
W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 466, 467.
Abraham *vs.* Casey, 179 U. S., 218.
Avery *vs.* Popper, 179 U. S., 315.
Mason *vs.* Missouri, 179 U. S., 334.
Chesapeake, &c., *vs.* Kentucky, 179 U. S., 394.

Citing—

The Mississippi case of L., N. O. & T. R'y Co. *vs.* Miss., 133 U. S., 591.
B'd of Liquidation *vs.* Louisiana, 179 U. S., 636.
Clarke *vs.* Clarke, 178 U. S., 192.
N. Y. Life Ins. Co. *vs.* Cravens, 178 U. S., 395.
Banholzer *vs.* N. Y. Life Ins. Co., 178 U. S., 405–408.
Erb *vs.* Morasch, 177 U. S., 584, 585.
Adirondack, &c., *vs.* New York State, 176 U. S., 346.
I. C. R. R. Co. *vs.* Chicago, &c., 176 U. S., 659.
Hartford Ins. Co. *vs.* Chicago, &c., 175 U. S., 100, 108.
Brown *vs.* New Jersey, 175 U. S., 174.
McCain *vs.* Des Moines, 174 U. S., 176, 177.
Missouri *vs.* McCann, 174 U. S., 586.
Covington *vs.* Kentucky, 173 U. S., 237, 238.
Oakes *vs.* Mase, 165 U. S., 364.

22 Wall., 215, 216; 164 U. S., 112; 14 How., 76–79; 163 U. S., 207; 159 U. S., 533, 534; 158 U. S., 435, 436; 157 U. S., 331, 332; 154 U. S., 426; 139 U. S., 467.

Adams *vs.* Nashville, 95 U. S., 19–21.

Mississippi Case of Lewis *vs.* Monson, 151 U. S., 549.

In the important case of Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112, which came up from a circuit court of the United States, was argued in January and not decided till November, 1896, and in which, among other eminent counsel, such great lawyers as ex-President Benjamin Harrison and Messrs. Wm. D. Guthrie, Clarence A. Seward, Joseph H. Choate, and John F. Dillon were engaged and filed elaborate briefs, this court says, on page 154:

"This court fully appreciates the importance of the question, and its decision has been reached after due reflection upon the subject, and after a careful examination of the authorities bearing upon it."

And after such careful consideration this court says:

"Coming before the court in this way, we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a State court."

And yet, notwithstanding it came up from a lower Federal court, this court announces the rule of its jurisdiction thus:

"If the act of the State legislature as construed by its highest court conflicts with the Federal Constitution, or with any valid act of Congress, it is the duty of the circuit court and of this court to so decide, and to thus enforce the pro-

visions of the Federal Constitution" (*ib.*, pp. 154, 155, citing many authorities).

And then says the court on page 155:

"If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is the duty of this court to so declare it; but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest State court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

See also Central Land Co. *vs.* Laidley, 159 U. S., 109–112.

No. 107, Balt., &c., *vs.* Mayor, &c., 179 U. S., 681.

This court says:

"Whether or not an act, prescribing such particular mode, has been repealed by a general revenue act not in terms repealing it, is a matter peculiarly within the province of the highest courts of the State to decide—and when such courts have decided the question, their decision is controlling."

Bailey *vs.* Maguire, 22 Wall., 215, 216.

In another case this court says:

"The supreme court of Tennessee held in the case before us, that the statute repeals and overrides the ordinance of exemption, and brings the bonds within the scope of general taxation. This is a decision by a State tribunal, upon the construction of its own statutes which we are bound to respect."

Adams *vs.* Nashville, 95 U. S., 19, 21.

The above case of Bailey *vs.* Maguire is referred to with approval on the rehearing in the late case of

Y. & M. V. R. R. Co. *vs.* Adams, 181 U. S., 583.

Now, if the plaintiff in error had stood on its original amended bill this court might hold that it presented color for a Federal question, and in that view it would affirm the judgment, for in order to decide that the exemption was repealable it would be necessary to take jurisdiction. Such a decision would be jurisdiction; but when the plaintiff in error makes an agreement that the Mississippi Mills case *is to be the law* of this case, then the claim that the exemption is irrepealable would be modified to that extent, and it would present a different question. In the one case this court would have to assume jurisdiction to decide that the plaintiff in error was bound by the decision in the Mississippi Mills case entering into and forming a part of its charter, and in the other case the plaintiff in error agrees to that, and thus saves this court the necessity of making a decision or of assuming jurisdiction. We will endeavor to illustrate the two views:

We say "*might*" because in this particular case we do not concede that this court should take jurisdiction under either view, for another principle comes in along here. It is this:

"The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution, or some law of the United States, upon the determination of which the recovery depends (Shreveport *vs.* Cole, 129 U. S., 36; New Orleans *vs.* Benjamin, 153 U. S., 411).

"Taking the law of Iowa to be as decided in the case mentioned, (that is by the supreme court of Iowa), it appears that the validity of the city government has been sustained by the State court, and in that event there is not the shadow of a Federal question in this suit, for if the city government

be valid, the regularity and validity of the proposed assessment must necessarily follow, and there cannot be even a pretence that the collection of the assessment would be without due process of law.

"The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the circuit court."

McCain *vs.* Des Moines, 174 U. S., 181.

So here, taking the law of Mississippi to be as decided in Mississippi Mills *vs.* Cook, it appears that the repealability of the exemption had been definitely fixed by the State court before the charter was granted, and if the repealability of the exemption be fixed or established the validity of the repeal would necessarily follow, and there would be "*not a shadow of a Federal question in this suit.*"

That there must be a real and substantial controversy to constitute color, see also—

Illinois Central R. R. Co. *vs.* Chicago, 176 U. S., 656, 657.

W. U. Tel. Co. *vs.* Ann Arbor, 178 U. S., 243, 244.

"The claim must be real and substantial. A mere claim in words is not enough."

Lampasas *vs.* Bell, 180 U. S., 282, 283.

Citing W. U. Tel. Co. *vs.* Ann Arbor, *supra*, and Gold Washing & Water Co. *vs.* Keyes, 96 U. S., 199, and Blackburn *vs.* Portland Gold Mining Co., 175 U. S., 571.

See also 169 U. S., 595; 167 U. S., 662; 165 U. S., 172; 147 U. S., 532; 142 U. S., 87, 88.

The laws of the State as ascertained and fixed by the decisions of the court of last resort enter into and form a part of the contract.

Los Angeles *vs.* Los Angeles, &c., 177 U. S., 575.
Douglass *vs.* Pike County, 101 U. S., 677.

"In this forum, the local law of Connecticut as to real estate is the law of that State as announced by the court of last resort of that State."

Clarke *vs.* Clarke, 178 U. S., 192.

"The elementary rule is that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof."

M., K. & T. R'y Co. *vs.* McCann, 174 U. S., 586.
W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 466, 467.

In the view we have just argued this court might have to assume jurisdiction to decide that the plaintiff in error was bound by the construction placed upon statutory exemptions from taxation, under the Mississippi constitution of 1869, by the supreme court of Mississippi, in the case of Mississippi Mills *vs.* Cook, 56 Miss., p. 40. This principle is so well settled, however, that we have endeavored to show that it does not present "*a real and substantial dispute*," but in the case at bar there is nothing for the court to decide. The plaintiff in error voluntarily comes in and agrees to be bound by the Mississippi Mills case, decided before its charter was granted, and if this court is bound by the construction placed on the constitution of 1869 by the supreme court of Mississippi in the Mississippi Mills case, then there is nothing for it to decide. Jurisdiction implies the power to decide, and *the power to decide* necessarily im-

plies the power to exercise discretion, to act freely, *to differ with the supreme court of Mississippi.* If this court is bound by the decision in the Mississippi Mills case, and the plaintiff has agreed that it shall be, then there is nothing to decide, and no occasion to exercise jurisdiction. The only thing this court can do is to announce what the supreme court of Mississippi has decided in the Mississippi Mills case, and it is no part of the jurisdiction proper of one court to act as herald for another, to announce what some other court has decided; and if this court, on looking into the Mississippi Mills case finds that it is there decided that exemptions from taxation are repealable, there is no course left but to dismiss the writ of error, as presenting no Federal question under the agreement. The effect of the agreement is to admit that a law repealing the exemption would be valid, and to rest on the first proposition in the amendment to the bill, that the claim that it had been repealed in fact "is utterly untrue"—to admit the law, but deny the fact.

In such cases this court holds that where there is no dispute as to the validity of the law, but a contest as to its proper construction, there is no Federal question.

Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 46.

Citing—

Central Land Co. *vs.* Laidly, 159 U. S., 103.

St. Joseph *vs.* Steele, 167 U. S., 661, 662.

INTERPRETATION OF NEW YORK STATUTES BY SUPREME COURT OF MINNESOTA.

This court says:

"That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and moves to dismiss because the supreme court of Minnesota did not deny the validity of the New York statute, but only construed it, and, even granting the construction was erroneous, faith and credit was not denied to the statute. Glenn *vs.* Garth, 147 U. S., 360, and Lloyd *vs.* Mathews, 155 U. S., 22, are cited. Those cases sustain the distinction which the defendant in error makes, &c. * * *

"The plaintiff in error assails the conclusions of the court. It asserts the court erred in its construction of the *Conway* case, and erred in its independent construction of the New York statute.

"Granting, *arguendo*, the correctness of both assertions, the validity of the statute was not denied," &c.

"Dismissed for want of jurisdiction."

Banholzer *vs.* N. Y. Life Ins. Co., 178 U. S., 405, 406, and 408.

"The writ will lie, if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and the proceedings regular * * * no Federal question is presented."

Avery *vs.* Popper, 179 U. S., 314.

"The parties stipulated and agreed that the plaintiff would make no claim of right to maintain the action except under and by virtue of the law in question. * * *

"The questions just stated are questions of local law, and in determining whether the statute violates any Federal right

secured by the Federal Constitution, we must in the particulars named, accept the interpretation put upon it by the State court."

W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 463, 466.

"As it is apparent from the foregoing considerations that, even conceding the contract to be as contended, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court."

See concluding paragraph of opinion in—

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 151.

And so in this case. The parties have agreed to rest on the Mississippi Mills case. That amounts to an estoppel, as we have above pointed out in Parkhurst *vs.* McGraw, 24 Miss., 134–136, and they are bound by what the Mississippi Mills case decides as much as if it was a judgment and *res adjudicata*, and this court has decided that a former judgment binds and concludes as well as to Federal questions as to others. This court holds:

"Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the subject-matter and the parties, binds the parties and their privies so long as the judgment remains unmodified or unreversed."

Mitchell *vs.* First Nat. B'k, 180 U. S., 480, 481.

The question of the impairment of the obligation of the contract under section 10 of article I of the Constitution of the United States was expressly put in issue, "embraced by the issues made," in the Mississippi Mills case, and was necessarily decided, and hence the decision is as binding on that issue as on any other. That it was expressly put in issue see—

Mississippi Mills *vs.* Cook, 56 Miss., 45.

See "Appendix B" to this brief.

Hence the Mississippi Mills case not only decided that the exemption was repealable, but it also decided the identical question attempted to be raised here, and that the repeal did not violate the Federal Constitution. It was embraced in the issue, and necessarily decided, and a writ of error could have been allowed from this court.

It was distinctly and expressly put in issue and conclusively established the double proposition that exemptions were repealable, and that a repeal was not repugnant to the Federal Constitution.

THE MISSISSIPPI MILLS CASE.

This brings us to a consideration of the celebrated Mississippi Mills case and what was therein decided. As it is the basis on which this case must rest, not only under well-recognized principles of law, but also by the agreement, it is important and material that this court should have a clear conception of that case, and for the convenience of the court we have had the case printed in full and inserted as "Appendix B" to this brief, page for

page, just it occurs in the 56th Mississippi Report, on pages 40 to 72. The marginal pages are the same as those in the report. In fact, as that case was by the agreement made a part of the amended bill, it should in reality have been copied in full as a part of the record in this case. The italics on pages 53, 62, and 65 are ours. What did the Mississippi Mills case decide? The supreme court of Mississippi decided that the Mississippi Mills case decided that exemptions were repealable.

Attala County *vs.* Kelley, 68 Miss., 44.

Whatever it decided, it is certain that the Mississippi constitution of 1869 was adopted on December 1, 1869, and that case was decided at the April term, 1878, and the charter in this case was granted in 1882, and there was no other decision construing, or even referring to, the constitution with reference to exemptions till the case of McCulloch *vs.* Stone, 64 Miss., 378, in 1886.

The rule as settled by this court is stated thus:

"Where subsequent State legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import."

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 147.

And this investigation and construction this court must make independently for itself. Many of the principal cases on this subject are collected and cited in—

Stearns *vs.* Minnesota, 179 U. S., 233.

See also Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 15.

As this court has decided, as shown *supra*, that the constitution and laws in force at the time, as expounded by the court of last resort, enter into and form a part of the contract, the constitution of 1869 and this case of Mississippi Mills, so far as applicable, enter into and form a part of the alleged contract of exemption in this case. If reading them into it makes it repealable, then its repeal could not impair its obligation. This court says:

"The elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it becoming irrevocable."

Citizens' Sav. B'k *vs.* Owensboro, 173 U. S., 644.
Also N. Y. & N. E. R. R. Co. *vs.* Bristol, 151 U. S., 567.

And the same rule applies when it is made repealable by a constitution.

Hamilton, &c., *vs.* Hamilton, 146 U. S., 267–271.

Now, what does the Mississippi Mills case decide? It certainly decides, whether the exemption is void or not, that it is repealable; and, this being the case, this court might rest there, and is under no real necessity to decide whether it is void or valid but repealable,

because in neither event would a repeal impair its obligation; but if this court thinks proper to give a definite construction, we think it is not inconsistent with the Mississippi Mills case to say the alleged exemption was unconstitutional and void. Let us look at the circumstances under which that case was decided. A short time before that this court had decided that "general encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties or drawbacks or any other advantage, are always under the legislative control." See concluding part of opinion in—

Salt Co. *vs.* East Saginaw, 13 Wall., 379.

That was an exemption to manufactories of salt. In a later case it was manufactories generally with the same ruling.

Welch *vs.* Cook, 97 U. S., 541, 542.

In the Mississippi Mills case it was factories of a certain class, and the act was known as the "factory act."

In the Salt Company case, 13 Wall., pages 376, 377, this court says:

"Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract."

And on page 378 it says:

"Charters granted to private corporations are held to be contracts."

In the Mississippi Mills case this case of Salt Co. *vs.* E. Saginaw was cited in the brief of the Attorney General, on page 49.

So in the consideration of that case the court had the Salt Company case before it, and evidently followed it, holding, as this court had done, that these exemptions to factories were repealable at the will of the legislature. But, having in mind the ruling of this court *supra*, that "charters granted to private corporations are held to be contracts," the court in the Mississippi Mills case was careful to say, on page 53:

"And the legislative act, whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the constitution."

And, on page 62:

"If the exemption is granted in the form of a contract in the charter, that is prohibited."

And again, on page 65:

"There is no limitation on the power of the legislature to incorporate railroad, manufacturing or other like corporations, and the grant of all the franchises usual and necessary to the complete and orderly performance and conduct of the several businesses and enterprises, except that the legislature cannot grant them an immunity from taxation. The legislature is prohibited by the constitution from making that contract with the corporations."

In the case of Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., pp. 278–287, No. 35, October term, 1900, here, the supreme court of Mississippi make a clear distinction between a grant

of exemption to all factories alike and the grant of an exemption to a particular corporation, holding the latter to be unconstitutional and void, and making the same distinction in the later case of Adams *vs.* The Tombigbee Mills, in which they held the exemption to be valid, but repealable on the authority of the Mississippi Mills case. This last case will be in the 78th Mississippi Report, which has not yet been published; but if this court wishes to examine it, certified copies of the opinion were printed and are on file in said case, No. 35, October term, 1900, here. It is also in 29 So. R., 470.

This court holds that the State court is justified in making such distinctions, and that they involve the construction of a statute, but no Federal question.

Wood *vs.* Brady, 150 U. S., 20–23.

In fact, in an ornate but powerful opinion delivered by Mr. Justice Brewer in a case where the State court had rendered conflicting decisions, and this court for that reason had to exercise its own independent judgment, this court held that a party had no strict legal right to rely on a decision unless he occupied the identical position and the statute construed was the identical statute, and in this case it is not the identical statute, and the plaintiff in error is not a factory. The court said:

"While in the matter of structure there is between the act of 1869 and that of 1880 a striking resemblance, there are also marked differences. Even if in form they are absolutely alike, yet, as they are acts respecting different classes of corporations, the validity of one would not necessarily determine the validity of the other."

And unanswerable reasons are given, and the court held the act unconstitutional, although the supreme court of Ohio had held a similar one valid, *before the one in controversy was granted.* It is very much like the principles involved here. We ask the court to re-read it.

Pleasant, &c., *vs.* Ætna Life Ins. Co., 138 U. S., 67.

Opposite counsel append a list of charter exemptions, and try to convince the court that the grant of these exemptions was so universal that, taken in the aggregate, the charters may be said to amount to a general law exempting all railroads from taxation, and to be in effect the same as the factory law exempting manufacturing enterprises by a general law. But we also append hereto a list as "*Appendix A*," to show that, as a matter of fact, in many cases no exemptions were granted, and that there was no uniformity or equality in those that were granted; so that the question here falls neither within the letter nor spirit of the Mississippi Mills case.

See also Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 282, 283.

But even if that contention were true, it would avail the plaintiff in error nothing, for this court, in the above-recited cases of Salt Co. *vs.* E. Saginaw, 13 Wall., and Welch *vs.* Cook, 97 U. S., and the Mississippi court in said Mississippi Mills case decided that all such general exemptions were repealable at the will of the legislature; and, if so, a repeal could not impair the obligation of the contract. It is immaterial to us which view this court takes. We are here simply trying to assist the court in arriving at the correct view.

The supreme court of Mississippi makes a distinction and

holds that the grant of an exemption to a single railroad corporation by name, when the exemption does not extend to all railroads in the State in the same class and condition, is repugnant to the constitution of 1869 and void.

Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 272–275.

And this court has unhesitatingly and uniformly held that provisions like those in the said Mississippi constitution rendered it impossible for the legislature thereafter to grant exemptions.

L. & N. R. R. Co. *vs.* Palmes, 109 U. S., 253–255.
St. Louis, &c., *vs.* Berry, 113 U. S., 475.
Trask *vs.* McGuire, 18 Wall., 391.
Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 274, 275, 288.

And this principle was approved in—

Keokuk, &c., *vs.* Missouri, 152 U. S., 303, 304, 310, 311.

In the case of Trask *vs.* McGuire, *supra*, a different word is used. In the constitution in that case, the word "*exempt*" is used instead of "subject." No railroad shall be exempt from taxation; all railroads shall be subject to taxation. In the Mississippi Mills case the court made a point that the constitution did not say shall be subjected to taxation, and in the Trask case they would have made the same point, that it did not say shall not be exempted from taxation. In the other cases the word "*subject*" is used. So that on an independent construction, as in the above case of Pleasant, &c., *vs.* Ætna Life Ins. Co., this court would undoubtedly

hold the pretended exemption to be unconstitutional, as the supreme court of Mississippi did.

But whether it was void or only voidable at the will of the legislature, there is and can be no doubt that under the Mississippi Mills case all exemptions to corporations for pecuniary profits were repealable, and that is all that it is really necessary for this court to decide. In order to be accurate and definite, it can decide that the alleged exemption was unconstitutional, and therefore repealable, or that it was valid *pro tempore*, but repealable.

In either view we will now again press the point and endeavor to show that the further question, whether it was in fact repealed, was a question of local law and statute, in which this court is bound by the decision of the State court, and hence one over which on a writ of error to a State court you have no jurisdiction, as in that class of cases you have jurisdiction over only Federal questions.

LOCAL LAW—JURISDICTION ON WRIT OF ERROR TO STATE COURTS.

On a question of the impairment of a contract, this court necessarily has the right, jurisdiction, and duty to exercise an independent judgment and construction over all those acts, constitutions, and statutes which enter into and form the contract and limit its import. It takes them all to make the contract. They are of its essence and must be considered. This court rightly says in St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 147, *supra*, that "the power to determine whether there be such impairment imposes also on

this court the duty, when necessary, to ascertain whether there was a contract and its import."

Also Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 15.

But the exact and particular point we wish to press here is that if this court, on an examination of the contract and its import, shall find that some subsequent act, unconnected with the original formation or existence of the contract or its obligation, would not impair such formation, existence, or obligation, then the subsequent act becomes one of purely local law or concern, over which this court has no jurisdiction on a writ of error to a State court.

In the case above cited this court says:

"Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation."

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 147.

As was done in that case, however, the court often, for convenience, reverses the proper order of argument and determines first whether the subsequent act complained of in fact had any existence. This is all very well when this court *agrees* with the State court as to its construction of the subsequent act; but if this court should not so agree, then it becomes all wrong, for under the rule repeatedly laid down by this court it would be bound by the construction of the State court and could not reverse, and the only effect of expressing an opinion would be to create dissatisfaction among the litigants and attorneys on both sides. In that very case this court concludes its opinion, on page 151, in these words:

"As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legis-

lative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract,—within the purview of the Constitution,—did or could result, it follows that the record involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiction of this court."

Again:

"In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned. The contention advanced, therefore, amounts to this, that a violation of the Constitution of the United States has been produced by the exercise of a power which, whatever view may be taken, could be brought into play without giving rise to a conflict with such Constitution. * * * In thus stating the ultimate deduction to which the proposition necessarily leads, we do not wish to be understood as implying that we think the reasoning upon which the supreme court of the State of Illinois placed its decision in this case is amenable to the inconsistency which it is insisted it embodies. As that consideration is wholly beyond the pale of our jurisdiction, we have not even approached its consideration."

Lombard *vs.* West Chicago, &c., 181 U. S., 42, 43, 45.

As "no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract,—within the purview of the Constitution,—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court."

St. Paul, &c., *vs.* St. Paul, 181 U. S. (conclusion), 151.

"That question involved the construction of the Wisconsin statute, but no Federal right. Dismissed."

Hale *vs.* Lewis, 181 U. S., 480.

"In arriving at these conclusions the court of appeals was construing and applying the laws of the State of New York, and we perceive no adequate ground for declining to accept its views in accordance with the general rule on that subject. In any view, we think that the proceedings on the part of the State impaired the obligation of no contract between it and the railroad company."

Adirondack, &c., *vs.* New York State, 176 U. S., 346.

The same view is expressed in the dissenting opinion of Messrs. Justices Harlan and McKenna in the case of American Express Co. *vs.* Michigan, 177 U. S., 419, in which they disagreed with the court as to whose duty it was to affix the revenue stamp. They thought it was the duty of the express company to affix and cancel the stamp, and then conclude:

"Whether the company, having issued a receipt duly stamped and canceled, could increase its charges against the shipper for the purpose, whether avowed or not, of meeting this additional expense, is not, in our opinion, a Federal question, and upon that point this court need not express an opinion."

And—

"Without implying that the reasoning by which this conclusion was deduced would command our approval were we considering the matter as one of original impression, and without pausing to note the ulterior consequences which may possibly arise from the ruling of the court below on the subject, we adopt and follow it, as the construction put by the supreme court of the State of Louisiana on the statutes of that State in a matter of local and non-Federal concern."

Board, &c., *vs.* Louisiana, 179 U. S., 636.

"However much we may doubt the soundness of any interpretation of the State constitution, * * * we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of the Commonwealth cannot be construed as exempting the lands in question from taxation."

Covington *vs.* Kentucky, 173 U. S., 237.

"With this part of the opinion, however, we have no concern. * * * If we are bound by the interpretation of the statute we need not review the reasoning by which that interpretation was reached, and we think we are bound by it."

N. Y. L. Ins. Co. *vs.* Cravens, 178 U. S., 395.

"Pursuant to this rule, and without expressing any opinion on the question, we assume," &c.

W. W. Cargill Co. *vs.* Minnesota, 180 U. S., 467.

We will illustrate the point by a case or two from Mississippi.

In the case of Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., 174, the charter granted an exemption for twenty years from the completion of the railroad to the Mississippi river, and this court, giving its own independent construction to the contract, decided that the exemption did not commence till the railroad was completed to the river. This was making a construction of the contract itself, which would have included any laws or statutes entering into and forming part thereof, but not some subsequent act or law unconnected with its original obligation.

And so in the late case of Y. & M. V. R. R. Co. *vs.* Wirt Adams, 180 U. S., 1, the court, in its necessary duty of "as-

certaining whether there was a contract and its import," decided that a new company was formed by the consolidation, and that the exemption, for reasons stated, did not enter into it. There the court, in ascertaining whether there was a contract, decided, as the effect of the consolidation, that there was no contract to impair, and hence it was unnecessary to decide anything else. In the Thomas case the *import* of the contract was decided, and, in the last case, the non-existence of the contract. On the rehearing the court had to construe certain laws to ascertain whether the contract was existent or non-existent in 1892.

And so in Louisville Water Co. *vs.* Kentucky, 170 U. S., 127. In that case there was a general law of February 14, 1856, which provided that "all charters, &c., shall be subject to amendment or repeal at the will of the legislature," &c. (page 128). By the act of April 22, 1882, the plaintiff in error was granted an exemption from taxation, but was to furnish water to the city of Louisville free of charge. On May 17, 1886, the Hewitt statute was passed, subjecting all property to taxation "not herein expressly exempt by law." This act took effect on September 14, 1886. The State of Kentucky attempted to collect the taxes for 1886, but this court held—

"That such exemption being a vested right under the act of 1882, to be withdrawn only by statute having a prospective operation, could not be withdrawn except as to taxes accruing after the statute took effect. * * * It results that the company cannot be held for taxes which were assessed and became due prior to September 14, 1886, when the Hewitt act took effect."

Ib., pp. 132, 133.

An executed contract can no more be impaired by subsequent legislation than an executory contract, and in that case this court held that the repealing statute could not have the effect given it by the State court because that would impair the obligation of the contract. There the impairment would be by the *statute as construed* and not by the decision.

But in the prior case of Louisville Water Co. *vs.* Clark, 143 U. S., 1, we respectfully submit that this court went farther than was necessary under its later rulings above quoted. That was a suit for the taxes of 1887 under this same Hewitt act.

There the court held that under the general statute of February 14, 1856, reserving the power to amend or repeal charters, the exemption granted in the act of 1882 was repealable, and then proceeds to review the statutes to show that the supreme court of Kentucky was right in holding that it had been repealed. What we contend is, that if it was repealable, then the decision of the supreme court of Kentucky that it had been repealed was conclusive on this court, as it would not involve the impairment of a contract. As was said by this court in the conclusion of its opinion:

"We therefore hold that it was competent for the legislature to withdraw the exemption from taxation granted by the act of 1882. The authority reserved in the act of 1856 to amend or repeal constituted a part of whatever contract was made by the act of 1882, and its exercise in the present instance cannot be said to have impaired the obligation of such contract, or in any just sense to have impaired rights previously vested."

Louisville Water Co. *vs.* Clark, 143 U. S., 17.

And so here, under the agreement, the constitution of 1869 and the Mississippi Mills case in 1878 "constituted a part of whatever contract was made by the act of 1882," and it being repealable, the question whether it was in fact repealed was one of local law, and this court is bound by the decision of the State court that it was repealed and need not express any opinion on that point.

We believe it was Benjamin Franklin who said that it was an unfair method of argument to proceed by asking questions; but we think a question is justifiable in this connection, and will bring to the front with clear effect the point we have just been pressing. It is this: That this court decided in the Clark case, *supra*, that the exemption was repealable, *and also that it had been repealed*, and thus agreed with the supreme court of Kentucky. But suppose this court had decided that it was repealable, and had then disagreed with the supreme court of Kentucky, and held that it had not been repealed, what kind of a decision would this have been on a writ of error to a State court—a decision that a repealable exemption had not been repealed?

As well said by this court:

"To grant the relief demanded would quite effectually overrule the decision of the State court upon a question relating purely to the local law of the State."

McCain *vs.* Des Moines, 174 U. S., 176.

"The court of appeals has found such to be the intention of the General Assembly in this case, * * *. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal."

Chesapeake, &c., *vs.* Kentucky, 179 U. S., 394.

And it quotes to the same effect the Mississippi case of—

L., N. O. & T. R'y Co. *vs.* Miss., 133 U. S., 587.

Ib., pp. 393, 394.

The rule is:

"Questions of public policy, * * * or upon contracts made and to be performed, *within one of the States of the Union*,—when not controlled by the Constitution, laws or treaties of the United States, or by the general principles of the commercial or mercantile law, or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court."

See, citing many authorities—

Hartford Ins. Co. *vs.* Chicago, &c., 175 U. S., 100.

As held by the court in St. Paul, &c., *vs.* St. Paul, 181 U. S., 147, *supra*, the correct and logical way is "first to determine whether the contract existed, and its true meaning."

See also—

N. O. *vs.* N. O. Water Works Co., 142 U. S., 88.

Y. & M. V. R. R. Co. *vs.* Adams, 180 U. S., 15.

If it is an irrepealable contract, then the court, having determined that, can proceed to investigate and pass judgment upon the acts or things which are alleged to impair it; but if the court finds that it is repealable, and that in no view of it could the act or thing complained of impair it, then it is clear that such act or thing is divested of every vestige of a Federal nature. In the other cases this court can reverse or use what order of argument it pleases to suit its own convenience, but if the act complained of would in

no event impair the obligation of the contract, then it seems to us that an inverse and illogical order of argument, by which this court would be enabled to avoid passing on the only Federal question before it, would be an evasion of its duty, and we do not think that a court with the great learning, ability, and dignity of this court would permit any line of reasoning or argument to have weight with it that would sacrifice the substance to the shadow. Put it in what light you please, turn and twist it as you may, if you consider that the exemption in this case is either void or repealable, and you get around deciding that fact by inverting the order of correct reasoning, and hold that it has not in fact been repealed, the substantive and real thing that you have done is to reverse the supreme court of Mississippi on a matter within its exclusive jurisdiction, and that did not and could not in the nature of things impair the contract, and that did not in truth or in fact violate a single provision of the Constitution or any law or treaty of the United States.

THE REPEAL.

If, however, this court concludes to go into the question of whether there was or was not a repeal, we call attention to the similarity between the code of 1892 and these laws passed on in the Welch and Louisville Water Co. cases.

Section 3744 of the Code of 1892 provides that "the following property, *and no other*, shall be exempt from taxation, to wit," and then proceeds to enumerate, and railroads are not mentioned.

This was amended by the act of February 7, 1894, and by

the act of March 23, 1896, by adding to the list, but railroads are nowhere mentioned. In each case they commence by saying, "the following property *and no other* shall be exempt from taxation." The italics are ours.

Laws 1894, pp. 25, 26.

Laws 1896, pp. 65–68.

In the Water Company case the statute declares that—

"All property, real and personal, within this State, not herein expressly exempt by law, shall be assessed," &c.

And this was held to repeal all exemptions not excepted.

143 U. S., 6, 11.

In the Welch case the statute provided that—

"There shall be levied on all real estate in said district, except that belonging to the United States, and the District of Columbia, and that used for educational and charitable purposes the following taxes," &c.

And the enumeration of the property to be excepted was held to exclude all that was not thus excepted.

Welch *vs.* Cook, 97 U. S., 541, 542.

Adams *vs.* Y. & M. V. R. R. Co., 77 Miss., 289-293, 316–318.

If the railroad of the plaintiff in error was liable to taxation, then section 100 of the constitution of 1890, heretofore quoted, prevented the legislature from thereafter ever remitting, releasing, postponing, or in any manner diminishing the same, and absolutely prohibited its extinguishment except by payment thereof into the proper treasury.

So far as the contention by opposite counsel is concerned, on page 62 of their late brief, that the exemption was not repealed by the Code of 1892, because section 8 of that Code prevents its application to local and private laws, it may be said that on page 25 they claim that a railroad charter is such a public act that the courts take judicial notice of it. Besides, the law of 1896 as to privilege taxes, and also that of 1896 as to what shall be exempt, neither of them have any reference to this section 8 of the Code.

As the taxes here were levied after the constitution of 1890 took effect, their argument on page 54, as to the effect of section 181 thereof, has no application, and their argument that if it did not apply to railroads, there would be little for it to apply to, is a mistake, as their brief shows it was made to apply to the Tombigbee mills, and would apply to many other things where corporations were legally entitled to exemptions for the time being.

On page 64 they show plainly and state that the railroad commission, under the law, were only to assess railroads "liable to taxation" and "abstain from assessing exempt railroad property."

It then clearly devolved on the railroad commission to determine whether the property was liable to taxation, and, that being so, its decision was *judicial* and could not be attacked in this collateral manner, but only by certiorari from the circuit court, under the Code of 1892, sections 89 and 90, as settled by the State supreme court in—

Y. & M. V. R. R. Co. *vs.* Adams, 77 Miss., 764, and authorities of this and other courts cited.

And the decision that the finding of the railroad commission is *res adjudicata* presents no Federal question.

Association, &c., *vs.* Kelley, 29 Ore., 412.
Altschul *vs.* Gittings, 86 Fed. Rep., 201, 202.
R. R. Co. *vs.* Patterson, 154 U. S., 130.
Palmer *vs.* McMahon, 133 U. S., 660.
San Francisco *vs.* Itsell, 133 U. S., 65.

So far as their claim in their brief, on pages 33 and 64, that the constitutional and unconstitutional parts of a statute are severable, that is concluded by the decision of the State court (Chesapeake *vs.* Kentucky, 179 U. S., 394, *supra*), and so is the State court's construction of the word "*non-taxable*" in code of 1892, section 3875. We think the main thing referred to in that section as non-taxable, from reading the whole section, was property "*in other States.*"

LACHES, ESTOPPEL.

So far as any claim may be made that the State is estopped by the laches or failure of its officers to collect the taxes for the previous years, the plain answer is, first, that the plaintiff in error has not lost anything or changed its position by reason of that fact; second, the State cannot be estopped by the laches of its officers, and, third, estoppel is not a Federal question and cannot be raised on a writ of error to a State court.

Weyerhaueser *vs.* Minnesota, 176 U. S., 558, 559.
Hale *vs.* Lewis, 181 U. S., 480, and authorities.
Speed *vs.* McCarthy, 181 U. S., 275.

United States *vs.* Beebe, 180 U. S., 353, 354.
Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., 185.
Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.
Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
2d Thompson Comm. Law Priv. Corp., § 2825.
(4th ed.) Blackwell Tax Titles, pp. 184–186.
Kansas City, &c., *vs.* Hannibal, 81 Mo., 290, 291.
Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 407, 408.

Respectfuly submitted.

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APPENDIX A.

RAILROADS NOT EXEMPT, REPEAL OF EXEMPTIONS, WANT OF UNIFORMITY, &c.

Laws of 1870.

Southern Railroad Association, p. 214.
West Feliciana, p. 250.
Brownsville and Holly Springs, p. 295.
Raymond and Bolton, p. 312.
Vicksburg and Meridian, p. 308.

Laws of 1871.

Winona and Yazoo River, p. 156.
New Orleans and Northeastern, p. 160.
New Orleans, Jackson and Great Northern, p. 172.
Prentiss and Bogue Phalia, p. 253.

The following railroads were given the privileges, but not immunities of other roads:
Macon and Tombigbee River, sec. 16, p. 155.
North Mississippi, sec. 13, p. 228.
Corinth and Nashville, sec. 1, p. 262.

Laws of 1872.

Natchez and New Orleans, p. 234.
Vicksburg and Natchez, p. 256.
West Point, Starkville and Kosciusko, p. 268.

The following railroads were given ostensibly the same privileges as the Mobile and Northwestern, but required to transport fertilizers free and pay a tax of one mill per mile on passengers:
Mississippi River and Sardis, sec. 15, p. 386.
Natchez and Brookhaven, sec. 15, p. 367.
New Orleans and Northeastern, sec. 1, p. 314.
Corinth, Kossuth and Kosciusko, sec. 27, p. 346.

LAWS OF 1873.

Floryville and Bogue Phalia, p. 581.
Hillsboro Branch, p. 599.
Mississippi and New Orleans, p. 598.
Grand Gulf and Brookhaven, p. 490.

The following railroads were required te transport fertilizers free and pay one mill per mile on passengers, as *supra*:
Pascagoula and Jackson, sec. 9, pp. 496, 499.
Mobile and Little Rock, sec. 8, pp. 576, 579.

LAWS OF 1874.

No railroad charters granted.

LAWS OF 1875.

Aberdeen, Fulton and Eastport, p. 198.
No other railroad charter granted.
Privilege or commutation tax levied on all railroads, p. 66.

LAWS OF 1876.

No railroad charters granted.

LAWS OF 1877.

Yellow Creek and Tombigbee, p. 165.
No other railroad charter granted.

LAWS OF 1878.

Alabama Central, p. 448.
West Point and Tombigbee, p. 473.
Port Gibson, Utica and Crystal Springs Railroad Company was granted exemption for five years, sec. 21, p. 472.
Privilege or commutation tax laid on all railroads, p. 87.

LAWS OF 1880.

Exemption of New Orleans and Northeastern repealed, p. 248.
Yazoo, p. 215.

Holly Springs and Memphis, p. 234.
Yazoo Delta, p. 252.
Mississippi and Sunflower, p. 264.
Liberty and Mississippi River, p. 687.
Ripley railroad released from subsidy, but required to pay all other taxes, secs. 1 and 2, p. 269.
Mobile and Northwestern released from back taxes, p. 271.

LAWS OF 1882.

New Orleans, Baton Rouge, Vicksburg and Memphis, p. 920.
Memphis and New Orleans Railroad and Levee Co., sec. —, p. 883.
Richmond and Danville Extension Co., p. 1036.
Some charters exempted railroad, its stock, franchises, &c., for twenty years after completion to some point, not to extend beyond twenty-five years from date of charter, as to State taxes, and perpetually as to county and town taxes, as—
Yazoo and Mississippi Valley, sec. 8, p. 847.
Alabama and Mississippi, sec. 8, p. 870.
Others not to extend beyond twenty years from date of charter, as—
Meridian, Brookhaven and Natchez, sec. 22, p. 1064.
Canton, Aberdeen and Nashville, sec. 8, p. 1009.
Others had straight exemption for twenty years from State, county, town, and special taxes, but no exemption as to stock, as—
Helena, Sardis, Pontotoc, and Birmingham, sec. 25, p. 895.
Others exempt railroad, its stock, &c., from taxation, but do not specify county or municipal taxation, as—
Mississippi and Arkansas, sec. 13, p. 942.
Others exempt the railroad, but say nothing about either its stock or counties and towns, as—
Birmingham and Northwestern, sec. 18, p. 1049.
Another exempts from State taxes for twenty years, and counties and towns perpetually, except as to the city of Meridian, as—
Meridian, Winona and Helena, sec. 22, p. 959.
Others exempt from State taxes for twenty years after completion to some point, and from county and town taxes for twenty years absolutely, as—
Mississippi and Mexican Gulf, sec. 27, p. 974.

Others exempt the railroad, but say nothing about the company or its stock, &c., as—

Mississippi, Alabama and Georgia, sec. 26, p. 988.

Others exempt the company, its stock subscriptions, and mortgage obligations, as—

Tennessee and Mississippi Rivers, sec. 26, p. 1000.

LAWS OF 1884.

Baldwin, Marietta and Purple Shell, p. 883.

Aberdeen and Fulton, sec. 3, p. 953.

The following railroads are given the exemption specified in section 22 of the charter of the Meridian, Winona and Helena Railroad Company, *supra*, except that the exemption as to cities and towns is stricken out. It will be noted also that said railroad is to be exempt for twenty years from completion to the Mississippi river, when some of the other railroads were not intended to go to the Mississippi river:

Macon and Tuscaloosa, sec. 2, p. 916.

Memphis, Oxford and Columbus, sec. 3, p. 920.

Mississippi River and Deer Creek, sec. 3, p. 918.

Helena, Memphis and New Orleans, sec. 3, p. 938.

Terry, Brandon and Northeastern, sec. 3, p. 937.

Arkansas City, Winona and Eastern, sec. 3, p. 971.

LAWS OF 1886.

The following railroads were exempted till one year after completion:

Kansas City, Memphis and Birmingham, sec. 11, p. 199.

Memphis, Birmingham and Atlantic, sec. 7, p. 206.

Pensacola and Memphis, sec. 21, p. 221.

Vicksburg, Yazoo Delta and Northeastern exempt one year from State but perpetually from city and town taxes, sec. 8, p. 227.

LAWS OF 1888.

Brookhaven, Columbia and Mobile, sec. 3, p. 509.

Corinth, Birmingham and Bolivar, p. 472.

Mobile, Hattiesburg and Jackson, p. 481.

The following railroads were exempt for one year after completion :

Macon, Tuscaloosa and Birmingham, sec. 17, p. 499.

Helena, Tupelo and Decatur, sec. 17, p. 508, and many others not exempt, or only till one year after completion, pp. 511, 514, 526, 531, 546, 557, 559, 570, 591.

LAWS OF 1890.

Large number of railroads incorporated. None exempted longer than one year after completion, pp. 677–778.

Then comes article 7 of the constitution of November 1, 1890.

And then Code of 1892, in which sec. 3379 puts a privilege tax on railroads, and sec. 3884 provides that the tax collectors shall collect the ad valorem tax on railroads "in all respects as they collect other taxes;" and sec. 3803 provides that they shall collect other taxes in United States coin, Treasury notes, and national currency, and besides, State warrants for State taxes and county warrants for county taxes.

APPENDIX B.

Statement of the Case.

THE MISSISSIPPI MILLS
v.
W. W. COOK, *Tax Collector.*

1. Taxation—Exemption of corporations—Intendment of sect. 13, art. 12, of the State constitution.—Sect. 13, art. 12, of our State constitution declares that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals." This section was not intended to confer power on the legislature to tax property of corporations of the class mentioned, for that existed without this section, as an inherent legislative power. It was not intended to require the taxation of property of corporations whose charters, previously granted, secured them from taxation, for this was beyond the power of the framers of the constitution. It was not designed to establish the rule that all corporations for pecuniary profits must always be taxed; nor was it intended to exempt from taxation the property of corporations other than those for pecuniary profits.

41 2. Same—Exemption of corporations—Sect. 13, art. 12, of State constitution construed.—Sect. 13, art. 12, of the State constitution does not declare that the property of all corporations for pecuniary profits shall be subjected to taxation, but that it shall be "subject" to taxation,—that is, liable to taxation. And it makes such property subject to "taxation the same as that of individuals;" so that, subject to the twentieth section of the same article, the legislature may at all times impose taxes on the property of such corporations, just as it may on the property of individuals. Sect. 13 fixes beyond legislative act the condition of

the property of such corporations as being liable to the exercise of the taxing power at the will of the legislature, and as subject to the same taxation that the property of individuals may be subjected to. The legislature may exempt property of a particular class, whether the owners be corporations or natural persons. But the property of corporations for pecuniary profits cannot be placed beyond the reach of the taxing power. It may not be taxed, but it must be ever liable. It need not be subjected, but it must always be "subject" to taxation, the same as that of individuals. The provision is mandatory as to the universal liability of such property to be taxed, but permissive to the legislature to tax it or exempt it, as may seem proper, in common with the property of individuals. Chalmers, J., dissented.

3. Same—Exemption—Sect. 20, art. 12, of State constitution construed.—Sect. 20, art. 12, of the State constitution provides that: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." The first clause of this section establishes the rule of equality and uniformity as to taxation throughout the State, and the latter clause requires that all property shall be taxed in proportion to its value. The words "all property shall be taxed in proportion to its value" do not require that all property shall be taxed, and deny to the legislature the right to exempt any. The purpose of their employment is to fix the rule for taxation, and to protect against any taxation of property except in proportion to its value, to be ascertained as directed by law. This provision does not prohibit exemption. The legislature may exempt property of a certain class, or property used for a certain purpose. The legislature has the power to select such objects of taxation as they may deem appropriate; but when any article of property is selected for taxation, it must be taxed in proportion to its value, and not specifically.

4. Same—Exemption—Unconstitutional acts.—Any legislative act, whether a charter or other statute, the purpose of which is to exempt "the property of corporations for pecuniary profits," and to put it in a

condition where it will not be subject to taxation, is in conflict with sects. 13 and 20 of art. 12 of the constitution of this State, and, of course, confers no immunity against subsequent legislation. Chalmers, J., dissenting.

Appeal from the chancery court of Copiah county, Hon. E. G. Peyton, chancellor.

The appellant was incorporated by the legislature on the 13th of April, 1871, with the name of "The Mississippi
42 Mills," and for the purpose of manufacturing cotton and woolen fabrics, and all kinds of machinery. The incorporators at once organized, and the corporation proceeded to operate in accordance with the provisions of its charter. On the 1st of April, 1872, the following act of the legislature was approved:—

"An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.

"SECT. 1. *Be it enacted by the legislature of the State of Mississippi*, That in consideration of the construction of factories, and the introduction of machinery for the purposes of erecting, furnishing and carrying on factories in this State, for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials, and for the making of all kinds of machinery and implements of husbandry necessary for the cultivation of the soil, and to manufacture all other articles or things, of whatsoever character or description, not inconsistent with the laws and constitution of this State or of the United States, and of the great benefit which the State will receive in the development of its manufacturing resources by means of said factories, and the large and increased amounts of machinery and capital that will, by this liberal-spirited policy, be invited to the State, thus giving employment to and supplying the wants of thousands of our people, and also the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with any and all manufacturing companies in this State, whose capital stock shall not be less

than ten thousand dollars paid in, not in operation before the passage of this act, that all taxes to which said company or companies shall be subject for the period of ten years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories, or the purchase of machinery, or paying debts incurred by any of said companies in constructing or purchasing the same; and it shall be the duty of the tax collectors in every county, in each and every year, for the period of ten years, to give to each of said companies a receipt in full for the amount of all said taxes due, upon receiving from each of said companies an affidavit, made by the president or treasurer of each of said com-
43 panies, that the amount of said taxes have actually, and in good faith, been paid and applied by each of said companies during the year, in payment of debts incurred, or money borrowed, as aforesaid; and which receipt, so given, shall be in full of all taxes, county, State, or municipal, to which said companies shall be subject; *Provided*, That whenever the profits of any of said companies shall enable it to declare and pay to its stockholders an annual dividend of four per cent. upon its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease towards such company or companies declaring said dividends, and said taxes shall be paid by such companies declaring such dividends, to the tax collector, to be by him paid over as required by law; *Provided further*, That nothing in this act contained shall be so construed as to exempt the property of any manufacturing or mechanical company from any tax levied by any county, city, or town, to meet the principal or interest on bonds issued by any such county, city, or town, to aid in the construction of railroads; and taxes thus levied and collected shall be applied to the payment of such bonds, and interest thereon.

"SECT. 2. *Be it further enacted*, That this act shall take effect and be in force from and after its passage."

The Mississippi Mills Company, having been "in operation before the passage of this act" of 1872, did not claim the benefit of its provisions. But, in 1873, all its buildings and machinery were destroyed by fire, and then the legisla-

ture passed an act, which was approved on the 17th of April, 1873, as follows:—

"An act to amend the provisions of an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.'

"SECT. 1. *Be it enacted by the legislature of the State of Mississippi*, That the provisions of an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi,' approved April 1, 1872, be and they are hereby extended to the Mississippi Mills, in the county of Copiah, and that the provisions and benefits of this provision shall be a part of the charter of said company, and shall apply to each and every manufacturing department of the same; *Provided*, That the president, or some officer of said company, shall make the oath required by said act, and in all things comply with the provisions of said act.

"SECT. 2. *Be it further enacted*, That this act take effect and be in force from and after its passage."

In 1877, the following legislative act was passed and approved:

"An act to amend an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi,' approved April 1, 1872, and to amend all acts extending the provisions thereof.

"SECT. 1. *Be it enacted by the legislature of the State of Mississippi*, That an act entitled 'An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi,' approved April 1, 1872, and all acts amendatory thereof, or acts extending the provisions thereof, be and the same is hereby so amended as not to exempt from taxation, State, county, or municipal, any property of any manufactory or manufacturing company, other than the paid-in capital stock of said companies, their machinery for manufacturing purposes, their manufactured goods, and the buildings in which their machinery is located, and the ground upon which buildings are situated, or which may be within the necessary inclosure around such buildings;

nor shall any tax to which any manufacturing company is or shall be subject on account of any other than the aforesaid description of property be appropriated or set apart for the benefit of said companies, or any of them; *Provided*, That all the property herein exempted shall become taxable and shall be assessed as other property, and the taxes thereon collected as on other property, whenever such property shall be used for any other than manufacturing purposes.

"SECT. 2. *Be it further enacted*, That the tax collectors of the several counties in which such manufacturing companies are situated, or may own property, shall, before giving to any such company any receipt for taxes, as provided in the said act of April 1, 1872, to which this (is) amendatory, collect from such company or manufacturer claiming the benefit of said acts, or either of them, an amount equal to the commissions of the assessor for assessing, and of the collector for collecting the tax on the property named in such tax receipt.

45 "SECT. 3. *Be it further enacted*, That such tax collectors shall pay over to the county treasurer of their counties the amount of the assessor's commissions so collected, and shall retain the tax collector's commissions so collected by him, as if the tax had been collected as other taxes are, and paid into the State and county treasuries.

"SECT. 4. *Be it further enacted*, That before any corporation or company shall receive the benefit of this act, the president or directors of such company or corporation shall take and subscribe an oath that the profits on the capital invested by such company or corporation, for manufacturing purposes, has not exceeded four per cent. per annum.

"SECT. 5. *Be it further enacted*, That this act take effect and be in force from and after its passage."

On the 4th of January, 1878, the Mississippi Mills Company filed a bill in chancery against W. W. Cook, tax collector of Copiah county, alleging that the acts of 1872 and 1873 constituted a contract with the complainant, *and that the act of 1877, which the tax collector threatened to execute by a sale of complainant's property, impaired the obligation of such contract, and was in violation of the Constitution of the United States.* The prayer of the bill was, that the tax collector and his successors be restrained, by injunction, from collecting the commissions or taxes allowed by the act of 1877, and

that they be compelled to execute the acts of 1872 and 1873. A temporary injunction was granted. The defendant filed a general demurrer to the bill. The chancellor sustained the demurrer, and the complainant appealed to this court.

Harris & George, for the appellant.

1. The power or capacity to make contracts generally, embracing the power to bind the State to forbear the exercise of particular powers, is an attribute of sovereignty, and is one of the great mass of powers belonging to the legislature; and by the Constitution of the United States these contracts are inviolable. 16 How. (U. S.) 369, 416. The legislature may favor particular enterprises or branches of industry by express exemption of the property employed in them from
46 taxation, or by merely omitting it from the scheme of taxation. The power to make this discrimination as to the subjects of taxation is an essential element of the taxing power, and enters into every intelligent system of revenue. Hence, sect. 20, art. 12, of the State constitution has been held not to restrict the legislature in the exercise of the power to select the subjects of taxation from the mass of taxable property, or to exempt from taxation the property employed in particular enterprises of public importance. This section requires taxation according to value, and excludes specific taxes, but does not require that all property shall be taxed in every revenue scheme. The exemption of property or money employed in manufactures of a particular kind is common. See Laws N. Y. and Me., 5 Greenl. 133; 4 Cow. 556.

2. Sect. 13, art. 12, of the State constitution, which forbids discrimination for or against corporations for profit, puts all property on the same footing, whether owned by individuals or corporations, and sect. 20, following, declares the rule as to all property; and these leave the legislature with power to grant, by contract, for an adequate consideration exemptions of property employed in a particular way, whether owned by individuals or corporations. The absence of any provision prohibiting such grants, or of any provision securing the right to repeal charters, leaving the legislature free to reserve or not, in such grants, the power to repeal or revoke them, would seem to forbid that we should attach to the thirteenth section a consequence so important as that

of disabling the legislature to make contracts respecting the taxing power. We find no provision directly prohibiting the legislature from making exemptions irrepealable. So important a limitation, if intended, would have been expressed in plain, unambiguous terms.

The constitution of Iowa has in it the thirteenth section, art. 12, of our constitution, but it has also a general provision reserving the right to repeal charters and every grant of privilege. The Constitution of Alabama declares that
47 charters shall be alterable at the will of the legislature. It also contains a provision similar to our thirteenth section of art. 12. It is plain that no irrepealable charters could be granted in these States, because the capacity to make binding contracts in charters of incorporation is taken away. The court in Alabama, and certain judges in Iowa, have held that this section was designed to prevent invidious exemptions of the property of corporations, even by an ordinary revenue law. In Alabama, the law condemned was one which made a discrimination of ninety per cent. in favor of the stock of a purely moneyed corporation. In Iowa, it was held that the law discriminated against individuals, by allowing a municipal corporation to tax them while it exempted the property of corporations. An exemption for a fair equivalent is not invidious. In the Iowa and Alabama laws there was no equivalent at all. The laws were, in their nature and under the constitution, subject to repeal. These decisions afford no warrant for giving to the thirteenth section of art. 12, standing alone in our constitution, the effect of all the provisions of the two constitutions to which we have referred. In this case we find no invidious exemption. It is a legislative proposition to everybody, for no one is denied the right to unite in the scheme sought to be fostered.

3. When a contract is made by the State, by charter or otherwise, by proposal offered and accepted, the courts deem the consideration adequate, when the offer or charter has been accepted, because the parties have been led to invest money or labor, or both, under the proposal. This is the distinction between a grant in a charter under which organization takes place, and a grant after the corporation is fully established, an exemption in the latter being regarded as a gratuity. Home of the Friendless *v.* Rouse, 8 Wall., 438.

4. The act of 1872 is not a charter granted. It is, in its terms,

an agreement by the State,—a proposal to persons generally. It is addressed to companies "not in operation" at the time of the passage of the act. The term "companies" can-
48 not be held to restrict the proposal to incorporated companies; but, if so intended, it opens the way to all persons to form such companies. The purpose of the act was, not to favor corporations, as such, but to promote manufactories in Mississippi, independent of the character of the owners. This act was repealable,—that is, the State was not bound to keep this proposal always before the country, and might, at any time, withdraw it; but as to those, whether incorporated companies or not, who had accepted the proposal, there was a vested right under the contract.

W. P. Harris, of counsel for the appellant, argued the case orally.

T. C. Catchings, attorney general, for the appellee.

1. Under section 20, art. 12, of our State constitution, taxation must be equal, uniform and ad valorem. It does not require all property to be taxed. The legislature may exempt property, either expressly or by not providing for its taxation. When exerted, however, the taxing power must be directed against all property alike, of the class selected for taxation. So, if property is exempted from taxation, all of that class must be exempted. Taxation must also be equal and ad valorem; hence what is known as a commutation tax is prohibited, for such taxation would be neither equal nor ad valorem. O'Kane *v.* Treat, 25 Ill. 561; Hunsaker *v.* Wright, 30 Ill. 148; 11 Wis. 37; Franklin Ins. Co. *v.* The State, 5 W. Va. 349; 38 Ind. 7; Zanesville *v.* Auditor, 5 Ohio St. 592; Exchange Bank *v.* Hines, 3 Ohio St. 15.

The property of A. cannot be exempted, and at the same time that of B. and C., of the same class, be taxed, for that would be neither equal nor uniform taxation; the property of A. cannot be taxed by one mode, and that of B. and C. by another, for that would not be equal taxation; it is not admissible to donate to A. the taxes assessed against his property, and at the same time to compel the payment of those assessed against the property of B. and C., for that would be doing indirectly

what cannot be done directly; and A. could not be
49 released from taxation, in whole or in part, because of supposed benefits therefrom to accrue to the public; for taxation, to be equal and uniform, must be laid in the same mode and to the same extent upon every particle of property of the class or classes selected for taxation. As the practice of commuting taxes is prohibited, a law exempting property from taxation, whether because of supposed public benefits to accrue, or otherwise, would be without consideration, and repealable at pleasure. *Salt Co. v. East Saginaw, 13 Wall. 376;* Columbia Mfg. Co. *v.* Vanderpool, 4 Cow. 556. Therefore, it follows, even if there was no other constitutional provision than sect. 20, that the legislature can only lay taxes ad valorem, and cannot part, either with or without a consideration, with its power to tax any and all property in the State, at pleasure. And there is no difference, in this respect, between corporations and individuals.

2. Sect. 13 of art. 12 of the State constitution was not intended to confer the power to tax the property of corporations, for the legislature already had that power; nor was it intended to protect corporations from invidious discriminations, for that protection was already afforded by sect. 20; and it was not intended to require that the property of corporations should at all times be taxed, for that would be to prohibit exemptions at all, inasmuch as it would not be allowed to tax the property of corporations, and at the same time to exempt similar property of individuals. It was designed to place the property of corporations for pecuniary profits upon the same footing as that of individuals. A law granting immunity from taxation is a mere act of bounty, and repealable at pleasure; but where the immunity is conferred by the act of incorporation, or an amendment thereto based upon a new consideration, the immunity rests upon a contract, and is a vested right. The distinction is obvious when we consider the difference in the sources of power from which the two kinds of exemption spring. The one comes from the power to regulate taxation; the other
from the power to create corporations. The latter
50 pertains to sovereignty. This sovereign power, if unrestricted, might grant immunity from taxation, in a charter of incorporation; and if the charter should be accepted and acted on, the grant would rest upon a contract, and be protected from legislative interference. Sect. 13 was

designed to limit this power, so that the legislature could not grant immunity from taxation. As to corporations not for pecuniary profits, there is no limitation.

Upon the whole, my conclusion is that there can be no irrevocable exemption of property, whether of individuals, or corporations for pecuniary profits; that the property of both must forever remain subject to taxation, whenever the legislature chooses to impose it; that the taxation of both must be by an equal and uniform rate; and that all taxation must be laid according to value.

L. O. Bridewell, on the same side, filed a lengthy and elaborate brief, arguing the case fully, and citing upon the point as to the unconstitutionality of the acts of 1872 and 1873, and the effect of sects. 13 and 20 of art. 12 of the State constitution, the following authorities: Ohio Life Ins. Co. *v.* Debolt, 16 How. 431; Zanesville *v.* Richards, 5 Ohio St. 243; Hill *v.* Higdon, 5 Ohio St. 589; The People *v.* McCreery, 34 Cal. 43; 5 Wall. 107; 28 Miss. 213.

T. C. Catchings, attorney general, and L. O. Bridewell, also argued the case orally.

The judges delivered opinions seriatim.

CAMPBELL, *J.*:

This case presents the question whether, under the constitution of this State, adopted on the 1st December, 1869, it is within the power of the legislature to grant to a corporation for pecuniary profit exemption from the taxation of its property, so as to free it from liability to be taxed during the time for which such immunity may have been granted.

The language of sect. 13, art. 12, of the constitution is,
51 "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals;" and that of sect. 20 of the same article is, "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

It was not intended by sect. 13 to confer power on the legislature to tax the property of corporations of the class mentioned. That existed, without this section, as an inherent legislative power.

It could not have been intended by this provision to require the taxation of the property of corporations whose

charters, previously granted, secured them exemption from taxation; for this was beyond the power of the framers of the Constitution, and of the people in adopting it, as repeatedly declared by the Supreme Court of the United States in reference to that clause of the Constitution of the United States which forbids any State from passing any law impairing the obligation of contracts.

It is not to be supposed that it was designed by this provision to fetter legislative discretion by an inflexible rule that the property of all corporations for pecuniary profit must always be taxed.

It cannot be said that this section intended to exempt from taxation the property of corporations other than those for pecuniary profit.

The language of sect. 13 is peculiar, and we have no other guide for its interpretation except its terms. No other provision of the Constitution sheds any light on this, whose meaning must be ascertained from the fair import of the words employed. There is no difficulty in determining the meaning of the words "the property of all corporations for pecuniary profits." In the language of grammar, that is the subject in the sentence, being that of which something is affirmed; and that which is affirmed of it is, that it "shall be subject to taxation, the same as that of individuals." An analysis of this predicate will show an affirmation that its subject, viz: the property of all corporations for pecuniary profits, "shall be
52 subject to taxation," and of a certain kind, viz., "the same as that of individuals." It is not declared that the property of the corporations mentioned shall be "subjected," but "shall be subject to taxation,"—that is, shall be liable to taxation. "The property of all corporations for pecuniary profits shall be subject to taxation;" but how? The answer is, "the same as that of individuals." The liability of the property of all corporations for pecuniary profit to taxation is thus secured by the fundamental law, and it is to be "the same as that of individuals." The language is not, shall be subject to the same taxation, but to "taxation the same as," etc. If the language as used is equivalent to "the same taxation as that of individuals," it must nevertheless be held that its object and effect were to fix the sort of taxation to which the property of all corporations should be subject, and not to affect the condition of

being subject to taxation. The peculiar arrangement of the words, "the same as," suggests as possibly within the contemplation of the framers of the constitution this view, viz.; the property of all corporations for pecuniary profit shall be subject to taxation, just as the property of individuals is. That of individuals is liable to taxation. They have not been granted immunity from taxation. Their property is subject to taxation, and so, in like manner, the property of all corporations for pecuniary profit shall be liable to taxation.

The import and purpose of sect. 13 seem to have been to establish the condition of the property of all corporations for pecuniary profit as being subject to taxation, and to forbid the exemption of such property from the liability to be taxed, by placing the property of all corporations for pecuniary profit, the same as that of individuals (natural persons), completely within the legislative power for the purpose of taxation, subject to the twentieth section of the same article of the constitution; so that the legislature may at all times impose taxes on the property of such corporations, just as it may on the property of individuals. The provision is mandatory, not that the property of corporations shall be taxed (that is left to the legislature), but such property shall ever be subject—*i. e.*,
53 liable—to be taxed, if the legislature so wills. Such property shall not be freed from liability to taxation, but shall always be liable to be taxed, just as the property of individuals is so liable. The "same as" are words of comparison. If such corporate property is placed beyond the reach of the taxing power, it is not subject to taxation. The constitution says it shall be "subject to taxation, the same as that of individuals;" *and the legislative act, whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the constitution;* and none will contend that a charter which contains provisions violative of the constitution confers any right wherein the conflict is.

This section of our constitution is copied from the constitution of Iowa, where it has been held by a majority of the court that it is not constitutional for the legislature to exempt the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed when that of individuals is taxed.

City of Davenport *v.* Railroad Co., 38 Iowa, 635; City of Dubuque *v.* Illinois Central R. Co., 39 Iowa, 56. In these cases, Cole, J., dissented, holding the view that the constitutional provision is permissive, and not mandatory.

The constitution of Alabama of 1868 has a provision nearly like the thirteenth section of art. 12 of ours, and it has been interpreted by the supreme court of that State to prohibit the legislature from discriminating, in a revenue law, in favor of a corporate property, so as to free it from bearing the same taxation which is imposed on individual property. Mobile *v.* Stonewall Ins. Co., 53 Ala. 570. In this case, it is said by the court that the provision was "added, in itself self-executing, without the aid, in fact in restraint, of legislative power, subjecting corporate property to the taxation imposed on individuals;" and it is announced in that opinion that "if property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals."

54 The principle upon which the cases in Iowa and Alabama rest is, that the constitutional provision under consideration is mandatory to the legislature, requiring it to impose upon the property of all corporations for pecuniary profit the same taxation as that imposed on the property of individuals; and, therefore, that it is unconstitutional for the legislature, in adopting a revenue law, to withdraw property of such corporations from the operation of it, so as to relieve them in any way from the same taxation imposed on the property of individuals. If the legislature cannot, by a general revenue law, discriminate in any degree in favor of property of corporations, forbidden because it is owned by them, how can it be claimed that it can, by a particular act of incorporation, secure in advance to the corporation absolute immunity from taxation of all kinds, beyond the reach of legislative recall or interference? If corporate property must be taxed the same as individual property, and the legislature cannot omit to tax it when it taxes individual property; if the constitutional provision is self-executing, and *per se* subjects corporate property to the same taxation as individual property, as held by the courts of Iowa and Alabama, it is plain that the legislature cannot thwart the constitutional requirement by the easy process of chartering corporations beyond the reach of the constitutional provision. If a corporation escapes taxation by virtue

of a legislative act, it is not "subject to taxation," whereas the constitution says it shall be, and thus a legislative act of incorporation is made to annul the constitution. It is said that corporate property must be taxed when individual property is; but how can that be, if corporate property is secure in immunity from taxation by virtue of a legislative grant?

The true view is that this provision of the constitution fixes, beyond legislative act, the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to. *The legislature may exempt*
55 *property of a certain class, whether the owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power.* It may not be taxed, but it must be ever liable. It need not be "subjected," but it must always be "subject," to taxation, the same as that of individuals, for the constitution so declares. The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper, in common with the property of individuals, which may be taxed, or not, for the time being.

Sect. 12, art. 12, of our constitution prohibits the creation of corporations with certain privileges therein enumerated; and then follows immediately sect. 13, which declares that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." It is thus suggested that the thought of the framers of the constitution was, to forbid the creation of corporations with certain privileges, and, leaving the legislature free from restriction as to the powers it should confer on corporations, except as inhibited by the twelfth section, by the thirteenth section to declare the liability to taxation, the same as that of individuals, of the property of all corporations for pecuniary profit. Sect. 14 of the same article prohibits the authorization of any county, city, or town to become a stockholder in any company, association, or corporation, except upon a condition prescribed in it.

It is thus seen that sect. 13 is in the midst of restrictions upon legislative power as to corporations, and its association strengthens the idea its terms import. *Noscitur a sociis.*

Certain corporate privileges are absolutely forbidden by sect. 12. The liability of corporate bodies to taxation the same as that of individuals is fixed by sect. 13, and the restriction of sect. 14 completes the constitutional safeguards as to corporations. This section stands as a barrier to any legislative act whereby to make the property of corporations for pecuniary profit not "subject to taxation the same as that of individuals." It sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation, and it was intended to establish the inflexible rule of being "subject to the same taxation" that the property of individuals is, but leaving the legislature free to tax the property of corporations or not, on the same principle on which it may or may not tax that of individuals.

The fact that our constitution does not contain a provision against irrepealable charters argues nothing against the foregoing views. The Alabama court did not find in the provision of the constitution of that State, like the thirteenth section of art. 12 of ours, the intention to reserve to the legislature the power to subject corporate property to taxation at all times, because it said that purpose was accomplished by another section of their constitution, and that this section was added to preclude the possibility of even a temporary exemption of corporate property from taxation. Undoubtedly, if under this section there could not be a temporary exemption, it would be absurd to say there could be a perpetual exemption by charter.

The first clause of sect. 20 establishes the rule of equality and uniformity throughout the State in taxation, and the other requires that all property shall be taxed in proportion to its value, to be ascertained as directed by law. This fixes the principle by which property shall be taxed, and leaves the legislature free to tax other things than property, as it may deem to be best, subject only to the rule of equality and uniformity as declared by the first part of the section. The words "all property shall be taxed in proportion to its value" do not require that all property shall be taxed, and deny to the legislature the right to exempt any. The purpose of their employment is to fix the rule for the taxation of property. Before the adoption of the present constitution, the power and the practice ex-

isted to tax property without regard to value. The
57 intent of this provision was to protect against the taxation of property except in proportion to its value, to be ascertained as directed by law. The ad valorem rule in taxing property is secured, and the ascertainment of this value, as directed by law, is made necessary, so that the proportion to its value may be borne in the matter of taxation of property. If the purpose had been to prohibit exemptions from taxation, it would have been declared in unmistakable terms. It was easy to declare that the legislature shall not exempt any property from taxation. The omission of such a provision makes it certain that no such prohibition was thought of.

The constitution of Missouri contained the provision that "all property subject to taxation in this State shall be taxed in proportion to its value;" and in The State *v.* North *et al.*, 27 Mo. 464, the judge delivering the opinion of the court said this provision "has been repeatedly construed by this court to mean, not that all the property in the State must be taxed, but that when any article of property is selected for taxation, it shall be taxed in proportion to its value, and not specifically." This view had been distinctly announced in Hamilton *et al. v.* St. Louis County Court, 15 Mo. 3. It is true that there seems to be a different view announced in a very singular opinion of the majority of the court, in Crow *et al. v.* The State, 14 Mo. 237; but the opinion of Napton, J., in that case, is convincing in favor of the opposite view, and which, as seen subsequently, became firmly established in that State. He says: "I understand this provision of our constitution to be simply designed as an injunction upon the legislature to lay ad valorem taxes upon such property as may be selected for taxation. It does not prohibit exemption or discrimination; it does not deny to the legislature the right to select such objects of taxation as they may deem most appropriate. * * * The legislature cannot make a law declaring that my horse, which is worth fifty dollars, shall pay the same tax with my neighbor's, which is worth one hundred. This would be a specific tax upon horses, without reference to their value. But they may decline
58 to tax, or exempt from taxation, all horses under a certain age, or all horses of a particular breed."

The constitution of California contained these words, viz.: "All property in this State shall be taxed in proportion to its value."

In The People *v.* Coleman, 4 Cal. 46, it was held, in a well-reasoned opinion, "that the legislature may select or exempt such property as in its discretion it may think proper," for taxation. This ruling was followed in High *v.* Shoemaker, 22 Cal. 363. It is true that these cases were, as to this, overruled in The People *v.* McCreery, 34 Cal. 432, and that subsequent cases have followed the last-named case; but we consider the view held in the earlier cases named the sounder one, and certainly as that with which, if any, the framers of our constitution were acquainted, because the case of The People *v.* McCreery was finally decided at the January term, 1868, of the supreme court of California, and was subsequently published in the volume of cases, and it is highly improbable that a knowledge of the new doctrine of the California court had become generally diffused. If, therefore, in borrowing this provision from the constitution of California, it is to be held that we took it with the settled judicial construction placed upon it, the inference is a just one that the makers of the constitution had in view the construction adopted in The People *v.* Coleman and High *v.* Shoemaker, *ut supra*, and which had been published for years, and acquiesced in by the courts and people of California until the time of the case in 34 Cal.

The constitution of Arkansas required laws to be passed taxing all real and personal property, enumerating certain things not to be taxed, and providing that "the General Assembly may exempt from taxation personal property to the value of five hundred dollars to each tax-payer." Of course, under this it was held that the legislature could not exempt other property than that embraced in the power to exempt. *Expressio unius, exclusio alterius.* Fletcher *v.* Oliver, 25 Ark. 289. And on examining the constitution of those States
59 whose courts deny the right of the legislature to exempt anything from taxation, it will be found that this view results from an unmistakable requirement by the constitution that everything shall be taxed, except as to the court of California, of which we have already spoken.

It follows from these views, that it was competent for the legislature to modify or repeal the act of April 1, 1872, and that the act of February 1, 1877 (Sess. Acts, 72), is constitutional, and that the bill of complaint is not maintainable.

Decree affirmed.

SIMRALL, *C. J.*:

The primary and general question for discussion and decision is the meaning and effect of the thirteenth and twentieth sections of the twelfth article of the constitution. What is the meaning and for what purposes were the thirteenth and twentieth sections of the twelfth article of the constitution adopted?

The taxing power pertains to the State as a sovereignty. It vests in the legislature, to which, in general terms, is committed the legislative power. See sect. 1 of art. 4. These sections were not in the constitution of 1817 nor 1832, yet the authority of the legislature under these constitutions to tax was plenary.

The sections not being necessary to confer power, must have been devised to regulate, control, or limit the power.

The twentieth section prescribes a plan, or rule, in accordance with which all laws imposing taxes must be framed. If the burden is imposed on property, the tax shall be in proportion to the value, and a scheme must be devised by which the value shall be ascertained. That idea is distinctly conveyed by the words, "according to its value, to be ascertained as directed by law." The entire clause reads, "All property shall be taxed in proportion to its value, to be ascertained as directed by law."

The ad valorem principle is the rule applicable to
60 property. What does the other clause of the section mean?—"Taxation shall be equal and uniform throughout the State." Certainly it intends that the rate shall be the same in every county and locality. There shall be no discrimination in one part of the State against another.

If the tax be on cattle or horses, that species of property must be taxed in all parts of the State, and the rate must be the same everywhere.

The injunction to the legislature is, that when it undertakes to tax property and has selected the subjects on which the burden shall be imposed, it must be laid on a valuation, and not on the acreage, for instance, and the per centum of the tax must be the same in all localities, and must be uniform; that is, all persons, owners of the same sort of property, must bear equally the burden.

The section does not necessarily require that all property in the State at the time of the assessment must be taxed. It

does not take away from the legislature the discretion to select the subjects. But when the selection is made, all property of that sort must bear its proportional part of the burden.

I turn now to the thirteenth section, and will treat it in the same method as the twentieth section. A close analysis of the language discovers a distinction between the different kinds of corporations. The convention excluded altogether those corporate bodies purely eleemosynary, whose chief object is to dispense benefits to the public, rather than make profit for their founders,—such as asylums for the sick, aged, or orphans; institutions of learning, and to promote Christianity, etc.

The purpose of the exclusion was, not to negative the power to tax them, but to leave them as they were before, and as they would have been without this section. In the legislative history of the State, such corporations never had been taxed. It seemed to have been the settled policy that they should not be. The convention left these charitable and eleemosynary bodies corporate in possession of their traditional immunity. It simply declined to make any rule respecting them.

61 The omission (purposely) of these bodies from the section gives force to the view already advanced, that there is nothing in the twentieth section, nor elsewhere in the constitution, imperative on the legislature to tax all property and exempt none. For it is manifest that these corporations were left out of the thirteenth section so that they might continue to enjoy the legislative exemption or pretermission from taxation. The idea embodied is, that whilst the property of corporations for profit shall be subject to taxation, there is a distinction between them and those bodies associated under charters to teach the Christian religion, to promote education, or provide asylums for the sick and destitute; these institutions are founded to dispense benefits to society, and not to those who establish them.

Pursuing further the analysis of the language, it will be observed that the sentence is constructed in the imperative mood,—shall be subject to taxation.

The words are mandatory, and are perpetually addressed to the legislature, the department of government charged with the duty and the power to tax. The command is, "Do nothing, refrain from any act or law, by which the property

of bodies politic, for profit, shall be loosed or acquitted from continuous subjectibility to taxation."

The next thing to be noticed is the import of the word "subject"—"subject to;" not that the taxes must be laid in all circumstances, and at all times; not, indeed, that they must be imposed at all, but that the property of those bodies shall be subject to taxation, as the legislature in its wisdom and discretion shall order.

The complete text is, "The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"The same as that of individuals," as prescribed in the twentieth section, on the plan of "equality," "uniformity," and "valuation." The corporation shall pay no more, no less, than individuals. There shall be no discrimination or invidious distinction. If that were the whole import of the section, it would be utterly meaningless and useless. It would have no distinctive value or purpose, and might just as well have been left out of the constitution. To come to that conclusion, we must imputte folly to the convention.

62

As already remarked, it did not require a grant of power to tax corporate property; and neither this section nor the twentieth were inserted in the instrument on any such idea, or for any such purpose.

Under the twentieth section, the legislature is obliged, if it taxes the property of corporations for profit, to tax the same as it taxes individual property. If it did not, the law would infract the rules of "equality," "uniformity," and "ad valorem" there prescribed.

If the legislature conformed to those rules (which to it are the supreme law), it is impossible that corporate property could be taxed higher, or in any other way, than similar individual property. The legislature is prohibited to enact an unjust, unequal, and discriminating law.

We must find some other motive for the thirteenth section than to accomplish something already secured by another section. That purpose is, the very important mandate that the property of corporations for gain shall be subject to taxation like that of individuals. It is mandatory in this: that nothing shall be done, or can be done, which shall withdraw it from perpetual liability to taxation.

If the thirteenth section is obeyed, the legislature cannot,

in any form of statute, take from the corporate property its liability to taxation. It cannot, by an act of incorporation, in view of the prospective benefits of the enterprise of the corporation, bind a future legislature so that it may not judge of the fitness and propriety of requiring the corporate property to share in part the public burden. *If the exemption is granted in the form of a contract in the charter, that is prohibited.*

63 This section was first adopted in this State in 1869; it is of modern origin in any of the American constitutions. It is plainly the lesson of history,—as much so as any of the great principles taken from Magna Charta. It grew out of the enormous aggregations of capital associated under common control to make gain for the proprietors, which have had in modern years such stupendous development in the railroad, mining, banking, manufacturing, and navigation corporations; and the habit of the legislature of this and other States, to stipulate an exemption from taxation perpetually, or for a limited time, or until a certain profit was made. The exemption was granted on the consideration that these great enterprises would aid to develop the industries of the State and increase its population. We had in this State no history, nor elsewhere, of the exemption of individuals, and no mischief, real or supposed, growing out of such exemption. There was, however, much experience, here and elsewhere, of the exemption of corporations such as I have named.

The thirteenth section contains no idea of hostility or repression towards corporations for profit. It gives no hint of a policy of discouragement. It contains no rebuke of legislation which pretermits from taxation the corporate property of an association struggling into existence. If the legislature should determine that it was wise and for the general good to pretermit the taxation of all property employed in the manufacture of cotton and woolen cloths, or agricultural implements, or household furniture, as a means to encourage investments in these enterprises, there is nothing in the thirteenth section, or combined with the twentieth, which would prevent it. The exemption would be on account of the nature of the property and the use to which it is put. The exemption of a church edifice, of a college, or a hospital, is because of the use to which the property is put. In these instances the property is of a

mixed nature, both realty and personalty. So, if the legislature, from a motive to promote domestic industries, choose to exempt—that is, refrain from taxing—
cotton or woolen factories, or plow or furniture fac-
64 tories, whether owned by joint-stock companies, corporate bodies, or individuals, it could do so. In such cases, in selecting the subjects of taxation, it passes by those sorts of property, or property put to a particular use. But distinction in the selection of the subjects cannot be made because the property belongs to a corporation or individuals, nor because the owners are poor or wealthy. If the exemption is because of the use, as in manufacturing, it must extend to the like property of individuals.

The struggle was long and arduous before the Supreme Court of the United States announced that a State, by an act of incorporation, could cede away for a time, or perpetually, the power to tax corporate property. A minority of the judges, as often as the question was presented, denied that such a grant in the charter was protected by the Federal Constitution, on the ground that the State could not, in that form of contract, denude itself of one of its sovereign powers, so necessary for its self-preservation.

The State courts have never cheerfully yielded their assent to this doctrine. The time, perhaps, will come when the Supreme Court of the United States will recede from it. The necessity of the preservation of the taxing power in its integrity had, perhaps, much to do in the adoption of the thirteenth section. It is wiser and safer, when we consider that the State lives on after successive generations have passed away, to leave to each legislature, in time to come, to judge for itself upon what persons and things taxes shall be laid, rather than that a legislature of today may declare that certain property, belonging to certain owners, and future accumulations to it, shall for a long term of years, or forever, be exempt from such impositions.

The constitution commits that entire subject to each legislature, when it comes to act on the subject, with the single restriction that, if taxes are imposed on manufacturing property (for illustration) owned by individuals, the like tax shall be
paid by corporations; but if the legislature, from
65 considerations of policy, exempts property because of its use and the purpose for which it is employed, the exemption cannot be given to the corporation as owner,

whilst the individual owner is required to pay the tax. That would not be equal or uniform.

There is no limitation on the power of the legislature to incorporate railroad, manufacturing, or other like corporations, and the grant of all the franchises usual and necessary to the complete and orderly performance and conduct of the several businesses and enterprises, except that the legisature cannot grant them an immunity from taxation. The legisature is prohibited by the constitution from making that contract with the corporations.

It is hardly necessary to say that these views do not apply to such charter exemptions granted before the present constitution went into effect, if such exemption was irrevocable or irrepealable when granted.

I have read the cases cited from Iowa, California, and Alabama, and do not entirely agree, in the reasoning, with any one of them; nor are these cases harmonious with each other.

The courts of the States having similar constitutional provisions do not seem to have given full and exhaustive deliberation to the subject; and, perhaps, have not reached a conclusion which will be accepted as a finality.

In the contrariety of views which they have expressed, I do not attach any more weight to their decisions than the reasoning is intrinsically worth. The subject is so new that it presents itself in this court as "*res integra*," and it ought to receive such solution as is approved by the reason and judgment of the members of the court.

CHALMERS, *J.*, dissenting:

As a citizen, I regard the construction placed by my associates on the constitution as most fortunate for the interests of the State; as a judge, I cannot see that it is warranted by the language of the instrument. It is the settled doc-
66 trine of the Supreme Court of the United States that a State legislature, if not prohibited by the local constitution, may contract away the taxing power of the State in consideration of public benefits to be derived from a particular enterprise; and that the law by which such a result is accomplished becomes, when passed, irrepealable, except by the consent of the persons in interest.

However erroneous I may regard such a doctrine, I am bound by my oath of office to observe and enforce it, until

that court which is upon these questions the supreme judicial arbiter shall recede from their own decisions.

The inherent power, then, exists in the legislature of this State, by charter or contract to exempt in perpetuity, or for a term of years, the property of individuals or of corporations, unless there is something in our constitution to inhibit such contracts; and the contract or charter, when made and accepted, is irrepealable. The right to contract away the taxing power of the State exists, unless expressly prohibited.

Let us look for the prohibition.

Two clauses of the constitution only have any possible bearing on the question, to wit, the thirteenth and twentieth sections of art. 12.

"SECT. 13. The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"SECT. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Sect. 13 plainly prescribes the same rule of taxation with regard to corporate property that is applicable or may be applied to the property of individuals. It prohibits any discrimination between the two classes of property. It declares that the property of corporations shall be liable or subject to taxation, the same as that of individuals. It thereby compels as against such property a rule as rigorous, and
67 prohibits in favor of such property a rule more rigorous, than that which is or may be applied to individual property. It is therefore both mandatory and inhibitory,—mandatory in the requirement that the rule of taxation shall be as onerous, inhibitory in the declaration that it shall not be more so. If it stood alone, if there was not elsewhere in the instrument some limitation upon legislative power with regard to the taxation of individual property, this section would have no other force or effect than that of establishing a uniform rule between the two classes of property, and that rule would be wholly determinable by the legislative will, except that it could not vary when applied to the different classes.

In all other respects it would be left wholly to legislative wisdom.

Turning to the twentieth section, however, we find certain

rules prescribed for the imposition of all taxes; and here, therefore, we discover those limitations upon the taxation of the property of individuals which the thirteenth section declares shall be applicable alike to the property of corporations for pecuniary profits.

The thirteenth section, therefore, is to be read in connection with the twentieth, and can have no complete and perfect interpretation until the meaning of the twentieth section is ascertained.

Whatever rate or rule of taxation may be adopted under the one, may be adopted under the other. Whatever exemption may be granted under the one, may be granted under the other. Whatever contract may be made with reference to individual property under the twentieth section, may be made in reference to corporate property under the thirteenth. Similarity of taxation necessarily implies similarity of exemption.

We all concur in holding that the twentieth section does not require the taxation of all the property in the State, but only that all that is taxed shall be taxed uniformly, equally, and according to value. These are the three rules, and the only rules, laid down with reference to taxing the
68 property of individuals. What do they mean? The requirement of uniformity means that all property belonging to the same class shall be taxed alike; so that all horses shall be taxed at the same rate, and all lands, or stocks, or merchandise. There is to be no discrimination between property of the same class; and it shall not be competent to levy one rate upon country lands and another upon city lands, or one rate upon horses of one breed and another upon horses of a different breed.

If the uniformity requirement stood alone, it would be competent to affix different rates to different kinds of property, and so to impose one rate on all lands, and another on all horses, and still another on all stocks, and still another on all merchandise. But this kind of discrimination is prohibited by the requirement of equality, by which it is made obligatory that the same rate shall be imposed on every kind and species of property that is subjected to taxation. This is the practical construction which has, by successive legislatures, been placed on these words, and I think it the true one. The clause requiring ad valorem taxation needs no explanation.

It is quite manifest that there is nothing in these requirements of uniformity and equality, and of ad valorem taxation, which in the slightest degree militates against that inherent right to contract away the taxing power which the Supreme Court of the United States declares to reside in every State legislature, unless restricted by the organic law.

If a proposition so plain needed to be strengthened, its correctness is placed beyond controversy by the fact that clauses substantially similar to our twentieth section are found in the constitutions of perhaps a third of the States of the Union; but in none of them has it been held that their effect was to forbid such contracts or charters.

My colleagues concede this. They admit that there is nothing in the constitution to prohibit an irrepealable exemption, by contract, of the property of individuals. They admit that under the settled doctrine of the Supreme Court of the United States we would be compelled to uphold such a contract, if made with reference to the
69 property of an individual. They confess their inability to discover any prohibition of such power of exemption in sect. 20. It follows, therefore, that said section contains an implied recognition of legislative power to make such contracts.

With this admitted and conceded interpretation of sect. 20, let us write out the two sections in full, giving sect. 13 literally, and giving sect. 20 as we have now ascertained its true meaning to be:

"SECT. 13. The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals."

"SECT. 20. Taxation shall be equal and uniform throughout the State. All property that is taxed shall be taxed in proportion to its value, to be ascertained as directed by law. The legislature may, by contract, in consideration of public benefits, exempt property from taxation, and such exemptions shall be irrepealable during the terms for which they are granted."

This rendering of sect. 20 must be admitted to be legitimate, since this meaning to its language is conceded to be the one which, under the decisions of the Supreme Court of the United States, we are bound to adopt.

How it is possible, with the two sections thus written, to deduce from sect. 13 a prohibition of chartered exemptions

as to corporate property, I am wholly unable to perceive. Conceding that the exemption is permissible under the one section, I am at a loss to see how it is inhibited by the other.

I find no such magic as my colleagues in the words, "shall be subject to taxation, the same as that of individuals." To me they have no meaning, other than that which would be conveyed by the equivalent phrases, "shall be viewed in the matter of taxation;" or, "shall be treated;" or, "shall be dealt with;" "the same as that of individuals." These, and many similar phrases which might perhaps be suggested, all convey but one and the same idea, namely, that
70 the law-giver, in the imposition of taxes, shall know no difference between the property of individuals and that of corporations for pecuniary profits. Alike they shall be taxed equally, uniformly, and ad valorem; alike they may be made the subject of a contract of exemption, which, when made, shall be irrepealable. It is said that the injunction is, that the property of corporations "shall be subject to taxation;" that this means that it shall ever be kept subject, and hence it can never be so dealt with that it will not be subject. If the sentence simply was, that "the property of all corporations for pecuniary profits shall be subject to taxation," it is possible that it might bear this construction, though it would be a most lame and inadequate method of expressing the idea. But the injunction is not that it shall be subject, or shall be kept subject, to taxation, but that it shall be subject "the same as that of individuals." Hence it follows that whatever may be done with reference to individual property may be done with reference to it.

There is no violation of the constitution until some law has been enacted in regard to it which would be invalid if applied to individual property. It cannot be taxed otherwise than uniformly and equally and ad valorem, because the property of individuals cannot be so taxed. It may be the subject of an irrepealable contract of exemption, because the property of individuals may be.

It "shall be subject to taxation the same as that of individuals." How is that of individuals subject? In subordination to the legislative right to exempt by contract. So, therefore, corporate property must be subject, also, in subordination to the right of exemption by contract or charter. The constitutional injunction that the subjectibility shall be the same is violated whenever a different rule is applied,

either to the imposition of, or the exemption from, taxation, because the rule of similarity tolerates no distinction as to either.

It is said that the framers of the constitution desired
71 to prohibit the perpetual exemption of corporate property, because that was a great evil of which they had practical knowledge; but they did not care to extend the prohibition to the property of individuals, because such exemptions, either in perpetuity or for a term of years, were unknown in American legislation. This might have afforded an excellent argument, in the constitutional convention, for making the distinction between the two sorts of property, but is worthless as showing that, in point of fact, such distinction was made.

But is it not remarkable that if the makers of the constitution had an idea so wise, so well defined, so beneficent, they could find no appropriate words in which to express it? Since the case of Knoop *v.* Bank of Ohio, 16 How. 376, there has been a persistent struggle, both in the State and Federal courts, over this claim that one legislature could, by contract or charter, so cede away the power of taxation as to fetter the hands of their successors. Many of the ablest jurists on the Federal bench, and a majority, perhaps, of the State courts, have questioned or denied it. If this was the idea which the framers of our constitution wished to set at rest, how easy would it have been to have declared in a single line that all charters should be repealable, or that there should be no chartered exemption from taxation of corporate property. It seems scarcely respectful to the givers of the organic law to suppose that, with ideas so well defined, they should have couched them in language which can only be understood by the most labored construction.

But they seem to have been men who had no difficulty, ordinarily, in expressing their meaning. Our constitution abounds with short, nervous, pithy sentences, which leave no doubt in the mind of the reader what it is that they intend to forbid or to sanction.

The thirteenth section of our constitution is borrowed from that of Iowa, and has been twice considered by the supreme court of that State. The exact question here presented
72 was not involved, but in the several opinions delivered there is no hint that the section was intended to prohibit contract exemptions from taxation. The section is

found also, somewhat broadened, in the constitution of Alabama; and in the single deliverance which has been made upon it in that State, there is a distinct declaration that it was not intended to accomplish such a result. City of Davenport *v.* Railroad Co., 38 Iowa, 633; City of Dubuque *v.* Illinois Central R. Co., 39 Iowa, 56; City of Mobile *v.* Stonewall Ins. Co., 53 Ala., 570.

Both the constitution of Iowa and that of Alabama, in addition to this section making the property of corporations for pecuniary profits subject to taxation the same as that of individuals, contain, also, clauses declaring all charters repealable.

The framers of our constitution adopted the section with reference to the subjectibility to taxation of corporate property, and omitted the one making charters repealable. This, it seems to me, settles the question, and demonstrates that while they desired unmistakably to place individual and corporate property on the same footing as to taxation, they did not propose in any manner to interfere with that inherent legislative right to contract away the taxing power which the Supreme Court of the United States had for years before the making of our constitution repeatedly declared to exist, except where denied by the organic law.

Office Supreme Court
FILED
MAR 22 1901
JAMES H. McKENNEY,
Clerk.

No. 81.

Motion to dismiss or affirm.

Filed Mar. 22, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 81.

THE GULF AND SHIP ISLAND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

R. C. BECKETT,
F. A. CRITZ,
Counsel for Defendant in Error.

(17,441.)

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 81

THE GULF AND SHIP ISLAND RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

Now comes the defendant in error, George P. Hewes, tax collector of Harrison county, by his counsel appearing in that behalf, and moves the court to dismiss the above-entitled cause for want of jurisdiction in this court to review the same, in that:

1. No Federal question is raised or involved.

2. No Federal question was raised at the proper time or in the appropriate way.

3. The decision of the trial and supreme courts of Mississippi is that the exemption from taxation claimed in this case as against the collector of taxes for the year 1896 was repealed by the provisions of the Mississippi Annotated Code of 1892, and there is a written stipulation and agreement made and filed in said supreme court "that Gulf and Ship Island Railroad Company was chartered and constructed after the decision of the supreme court of the State of Mississippi, in the case of The Mississippi Mills *vs.* Cook, 56 Miss., p. 40, and that the incorporators and stockholders invested their money in said enterprise relying upon the adjudication of the supreme court of Mississippi in said case, as the law."

Record, p. 14.

And *that* case not only decided that exemptions were repealable at the will of the legislature, but also that such repeal did not violate the Federal Constitution, that being one of the questions involved (56 Miss., p. 45).

And the said defendant in error, by counsel aforesaid, also moves the court to affirm said judgment from which said writ of error was sued out, because although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that said writ of error was obtained for delay only.

R. C. Beckett,
F. A. Critz,
Counsel for Defendant in Error and for said Motions.

To Mr. E. J. Bowers,

Attorney of Record for Plaintiff in Error:

Please take notice that on Monday, the 18th day of April, 1901, at the opening of the court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said court thereon.

Accompanying is also a copy of our brief in support of the same, as well as on the merits, filed in said Supreme Court on February 27, 1901, in this case.

R. C. Beckett,

F. A. Critz,

Counsel for Motions and Defendant in Error.

Executed by delivering to the within-named E. J. Bowers, Esquire, this day a true copy of the foregoing motion to dismiss or affirm, and notice, and also a true copy of the brief within mentioned as filed on February 27, 1901.

This March ——, 1901.

No. 5.

Stipulation as to Taxes for 1898

Filed Oct. 14, 1901.

Office Supreme Court U. S.
FILED
OCT 14 1901
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM 1901.

No. 5.

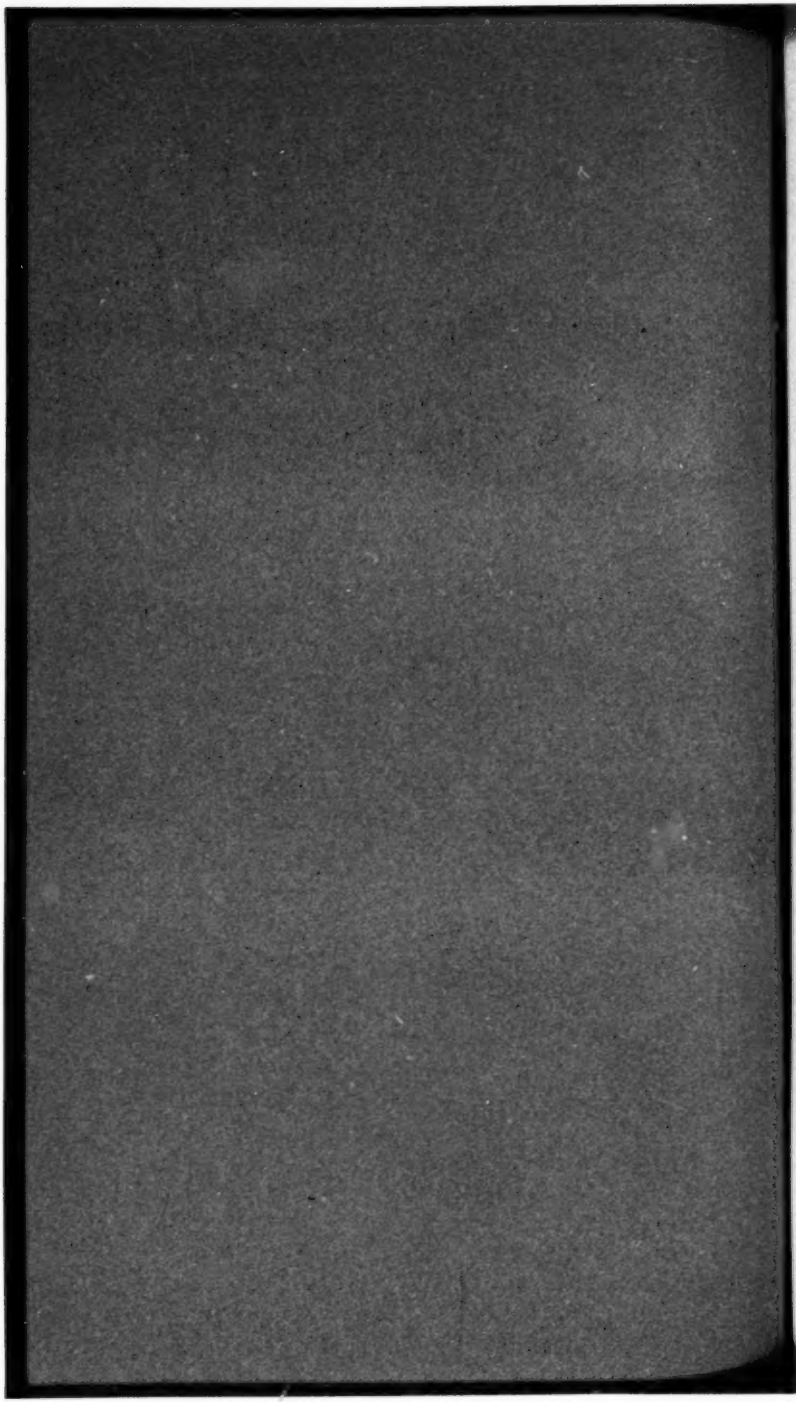
THE GULF & SHIP ISLAND RAILROAD COMPANY ET ALS., PLAINTIFFS IN ERROR,

versus

GEORGE P. HEWES, TAX COLLECTOR, DEFENDANT IN ERROR.

Stipulation that Taxes in Controversy Were Levied and Demanded for the Year 1898.

"The Legal Printer," J. O. Beaser, 611 Camp St., N. O., La.



Supreme Court of the United States,

The Gulf & Ship Island Railroad Company, et als., *vs.* Geo. P. Hewes, Tax Collector of Harrison County, Mississippi.	No. 5.

In this cause it is agreed as a matter of fact that the property and privilege taxes demanded by Geo. P. Hewes, Tax Collector, of the Gulf & Ship Island Railroad before and at the time of the filing of the bill in this cause, were the property and privilege taxes assessed against said railroad company, for the fiscal year 1896.

This stipulation is made in order to make clear the year for which said taxes were levied and demanded.

EDWARD MAYES,
EATON J. BOWERS,
For Plaintiffs in Error.

R. C. BECKETT,
F. A. CRITZ,
For Defendant in Error.

Supreme Court of the United States.

No. 5.—October Term, 1901.

The Gulf and Ship Island Railroad Company et. al., Plaintiffs in Error,
vs.
George P. Hewes, Tax Collector, &c.

In error to the Supreme Court of the State of Mississippi.

[November 18, 1901.]

This was a bill in equity filed in the Court of Chancery of Harrison County, Mississippi, by the railroad company, against the tax collector of that county to enjoin the collection of certain property and privilege taxes assessed against the railroad company for the fiscal year 1896.

The bill averred in substance the incorporation of the railroad company by an act of the legislature of the State of Mississippi, approved February 23, 1882, the eighteenth section of which act declared: "That said company, its stock, its railroads and appurtenances and all its property in this State, necessary or incident to the full exercise of all powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act;" that immediately thereafter the corporation entered upon the construction of its road, and at the time of the filing of the bill had about seventy-five miles in operation; that, notwithstanding this charter exemption, the State Railroad Commission has returned its property for taxation, and that defendant has demanded not only a privilege tax, but a property tax levied for State and county purposes, and threatens seizure of its property. Wherefore an injunction was prayed.

To this bill, defendant interposed a demurrer for want of equity, and because the exemption was a mere bounty, repealable at the pleasure of the legislature, and void of any element of contract. The demurrer was sustained, and leave granted the plaintiff to amend its bill. Thereupon it filed an amendment alleging that the exemption in the charter constituted a contract between the plaintiff and the State; that the railroad was constructed upon the faith of such contract, and that it was not within the power of the State to repeal the exemption, and invoking in that connection the contract clause of the Constitution. Defendant again demurred. The demurrer was sustained, and an appeal granted to the Supreme Court of the State, which affirmed the decree of the court below. Whereupon plaintiff sued out a writ of error from this court, which defendant moved to dismiss.

Mr. Justice Brown delivered the opinion of the Court.

1. The motion to dismiss must be overruled. Counsel for the railroad company appears to have invoked the contract clause of the Constitution

upon the original argument; but whether this be so or not, the bill was subsequently amended under leave of the court, by averring that the charter and the exemption from taxation contained in the eighteenth section constituted a contract between the plaintiff corporation and the State of Mississippi that the State would not demand any taxes upon its capital, property or stock for the term of twenty years from the enact-actment of the charter; and that, if said exemption from taxation had been repealed, which the company denied, it was not within the power of the State to repeal such exemption for the reason that the same constituted a contract upon which the company had acted, and upon the faith of which it had constructed the road; and that such repeal was a violation of the contract clause of the Constitution. The Federal question was properly raised, and there is at least sufficient color for it to sustain our jurisdiction. No opinion was delivered by the Supreme Court, but the Chief Justice certifies that the validity of the State legislation subsequent to the charter of 1882 was drawn in question upon the ground of its impairment of the contract contained in such charter, and that the decision was in favor of the validity of such legislation. While such a certificate is insufficient to give us jurisdiction, where such jurisdiction does not appear in the record, it may be resorted to, in the absence of an opinion, to show that a Federal question which was otherwise raised in the record, was actually passed upon by the court. (*Armstrong* v. *Treasurer &c.*, 16 Pet. 281; *Yazoo & Miss. R. R. Co.* v. *Adams*, 180 U. S. 41, 48; *Railroad Co.* v. *Rock*, 4 Wall. 177; *Parmelee* v. *Lawrence*, 11 Wall. 36; *Gross* v. *U. S. Mortgage Co.*, 108 U. S. 477.)

2. The bill set out, and, until the argument in this court, the plaintiff company relied solely upon, a charter granted February 23, 1882, by the legislature of Mississippi to incorporate the Gulf and Ship Island Railroad Company, the eighteenth section of which declared: "That in order to encourage the investment of capital in the works which said Company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said Company, its stock, its railroad, and appurtenances, and all its property in the State necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this Act."

To strengthen its position, and to enable the company to rally to its support an exemption antedating the Constitution of 1869, upon which the defendant relies, the plaintiff calls to our attention an act passed in 1850 to incorporate the Gulf and Ship Island Railroad Company, and a further act approved March 1, 1854, amendatory of that act, the eleventh section of which declares "that the property and investments of the

Company connected with this enterprise, within this State, shall not be subject to taxation until the road shall be in full operation and completed."

The position of the plaintiff in this connection is that, prior to the Code of 1857, there was no general law and no constitutional provision in any way restraining the legislature from granting irrepealable exemptions, and that the charter of 1882 was a mere continuance of the original charter of 1850–1854; that the construction of the road, authorized by that charter, had never been abandoned, and that so late as 1872 the legislature had adopted a memorial to Congress praying that a land grant made by Congress in 1858 for the benefit of the Gulf and Ship Island Railroad Company, and which had lapsed to the United States by the intervention of the Civil War, might be revived in favor of that railroad.

But we are of opinion that the charter of 1882 cannot be considered as a revival or continuation of the charter of 1854, since the names of the incorporators are entirely different, the routes of the two railroads are also different, and no reference is made in the charter of 1882 to the prior charters, although the names of the two corporations are identical. There is nothing in the act of 1882 to indicate even the existence of a prior act incorporating a road under the same name. It is true that, at the same session of the legislature (1882), another memorial to Congress was adopted by the legislature for a revival of the grant of public lands made by the United States in 1856 to aid in the construction of the Gulf and Ship Island Railroad, but in this very memorial it was stated that "at its present session our legislature has granted *a new act of incorporation* with liberal provisions, thus again attesting the abiding and earnest interest felt by our people in this important work."

It is also true that on March 13, 1884 the legislature passed another act to facilitate the construction of the Gulf and Ship Island Railroad, and for other purposes, the eighth section of which declared: "That said Gulf and Ship Island Railroad Company are hereby subrogated to all the rights and privileges heretofore granted by the State of Mississippi to the Gulf and Ship Island Railroad Company, and shall have the right to use and enjoy such field notes, maps and surveys as have been heretofore made in the interest of said road as were authorized and granted by the State under the acts approved March 2, 1854, and December 3, 1858." This is an effort to subrogate the new railroad to the rights and privileges of the former one, but its language contains an implied admission that, without such subrogation, the rights and privileges of the former company had lapsed, and that a new act was necessary to revive them. But if the act be considered as a revival of the rights and privileges which had formerly belonged to the old company, such rights and privileges would be subordinated to the provisions of the new Constitution of 1869, which

in the meantime had been adopted. (*Planters' Ins. Co.* v. *Tennessee*, 161 U. S. 193, 198.) In addition to all this, however, the better opinion is that a subrogation to the "rights and privileges" of a former corporation does not include an immunity from taxation. (*Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174.)

We are unable to see that there is anything in this legislation to indicate that the plaintiff company stands in a position to escape the application of the Constitution of 1869. Indeed, it seems to us entirely clear that the injection of the charter of 1850–1854 into this case was a mere afterthought; and that the charter upon which the plaintiff must rely is that of 1882, set forth in this bill, and that such charter must be construed in subordination to the Constitution of 1869, which we now proceed to consider.

3. The only provisions of the constitution pertinent to this case are the following sections of Article XII:

"SEC. 13. The property of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals.

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

As it is not altogether clear from the language of these sections whether it was competent for the legislature to grant to a railroad company an exemption from taxation, it is conceded by both sides to this controversy that we are bound to look to the decisions of the Supreme Court of Mississippi at the time this charter was granted, for their proper interpretation. (*Douglass* v. *County of Pike*, 101 U. S. 677.) While the question of contract or no contract in a particular case is one which must be determined by ourselves, every such alleged contract is presumed to have been entered into upon the basis, and in contemplation of, the existing constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial authority of the State. (*Taylor* v. *Ypsilanti*, 105 U. S. 60; *Wade* v. *Travis Co.*, 174 U. S. 499, 509, and cases cited.)

We are referred to the case of *Mississippi Mills* v. *Cook*, (56 Miss. 40,) decided in 1878, four years prior to this charter, as settling the proper construction of these sections of the constitution. Indeed, counsel stipulate that the stockholders invested their money in reliance upon this adjudication. The Mississippi Mills were chartered in 1871 for the purpose of manufacturing cotton and woolen fabrics, and in 1872 an act was passed, of which the Mississippi Mills were subsequently given the benefit, providing that all taxes upon the property of said company should be applied to the payment of debts which the company had incurred in the construction of their factory. In 1877 this act was so far amended as to be sub-

stantially repealed; and in 1878 the company filed a bill in chancery against the tax collector, setting up the acts of 1872 and 1873 as constituting a contract with the company, and alleging that the act of 1877 impaired the obligation of such contract, and was in violation of the constitution of the United States.

The bill was held not to be maintainable, the court deciding:

(1.) That it was not intended by section 13 of article XII of the constitution to confer power on the legislature to tax the property of corporations, because that existed without this section as an inherent legislative power.

(2.) That the property of the corporations mentioned was declared to be *subject* to taxation, that is, liable to taxation, the same as that of individuals, but it was not necessarily to be *subjected* to taxation. (Since overruled in *Adams* v. *Railroad Co.*, 77 Miss. 194.)

(3.) That any legislative act, "whether it be a charter or other form of law, which says it shall be exempt, and not subject to taxation, is in conflict with the constitution." But that the legislature might exempt property of a certain class, whether the owners were corporations or natural persons, but corporate property could never be placed beyond the reach of the taxing power. "It may not be taxed, but it must be ever liable. It need not be *subjected*, but it must always be *subject*, to taxation, the same as that of individuals, for the constitution so declares. The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper, in common with the property of individuals, which may be taxed or not for the time being." See also *Vicksburg Bank* v. *Worrell*, (67 Miss. 47;) *Railroad Co.* v. *Lambert*, (70 Miss. 779.)

(4.) That it followed from this that it was competent for the legislature to modify or repeal the act of 1872, and that the repealing act of 1877 was constitutional, and operated as a repeal of the exemption. This was reaffirmed in *Attala Co.* v. *Kelley*, (68 Miss. 40;) *Railroad Co.* v. *Lambert*, (70 Miss. 779.)

(5.) In a concurring opinion, delivered by the Chief Justice, he held that if the exemption were granted in the form of a contract in the charter, it was prohibited.

Although the decision of the case was put upon the ground that the exemption from taxation contained in the acts of 1872 and 1873 was a mere bounty, and subject to repeal by the legislature, the report would seem to indicate the opinion of the court to have been that no exemption was valid which was contained in the charter of a particular corporation; (a question not necessarily involved,) but whether this be so or not, it is entirely clear that the court intended to decide that, under the Constitution of 1869, any exemption granted by the legislature was a mere bounty and subject to repeal.

Under this construction of the constitution it becomes unnecessary to decide whether the exemption contained in the charter of 1882 be void or not, since, as it appears by the certificate of the Chief Justice, the decision of the court below was put upon the ground that the subsequent legislation, and particularly the Annotated Code of 1892, which was construed by the court as repealing the exemption in the charter, was constitutional and valid. Indeed, counsel for the collector, in their brief, expressly disclaim any reliance upon the position that the exemption in this case was originally unconstitutional and void, putting their case expressly upon the ruling of the Supreme Court that such exemption had been repealed.

Holding then, as we do, that the exemption was subject to repeal, it only remains to consider whether the Code of 1892 did in fact repeal and abrogate it. In this connection the State relies upon section 3744 of the Annotated Code of 1892, which declares that "following property, *and no other*, shall be exempt from taxation, to wit." Here follows a list of some twenty classes of property, among which, however, railroads are *not* included. If an exemption under a special act be repealed by the words "and no other," contained in a general act declaring what property shall be exempt from taxation, it would follow that this exemption was repealed by the Code of 1892, and the principle applied in *Louisville Water Company* v. *Clark*, (143 U. S. 1, 11,) would also be applicable here. The railroad company, however, insists that its rights are saved by section eight of the same code, which declares that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption, unless it be expressly so provided herein." There being no such express provision in the code respecting the act of 1882, it is insisted that the exemption contained in that act is saved. The Supreme Court, however, seems to have held, as it had already done with respect to a similar section in the Code of 1880, (*Adams* v. *Railroad Co.*, 77 Miss. 317,) that the exemption was not saved.

We do not find it necessary to pass upon the soundness of this conclusion, as we are of opinion that the question whether the ruling of the Supreme Court, that a *repealable* exemption has been in fact repealed by a subsequent statute, is one which turns upon the construction of a State law, and is not reviewable here, although if the exemption were *irrepealable* and thus constituted a contract, it would be our duty to decide for ourselves whether the subsequent act had repealed it or impaired its obligation. The only contract relied upon is one exempting the property of a particular corporation from taxation for a certain number of years; a contract which, in the light of the State constitution and the prior decisions of the State courts, must be read as if it contained a proviso that the legislature should not in the meantime alter, amend or repeal the act. Hence, as the legislature is left entirely free to act upon the subject, no subsequent legislation could possibly impair the obligation of the contract, if such exemption

can be called a contract at all. If no statute *could* impair it, it goes without saying that none *did* impair it. If, then, the decision of the Supreme Court that the legislature had in fact repealed the exemption was right, the railroad company cannot complain, since the legislature had done no more than it had a right to do. If, upon the other hand, we should be of opinion that the Supreme Court was wrong in holding the exemption repealed, such exemption would be abrogated not by the act of 1892, but by an erroneous construction of that act. Our only authority to review the action of the State courts in this class of cases under R. S. sec. 709, arises when the validity of a State *statute* is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. Now, if the statute, adjudged to be valid, does not impair the obligation of any contract, it is not repugnant to the Constitution. It is the fact that the act, as construed by the Supreme Court, impairs the obligation of a contract that gives us jurisdiction, and if there be in the act of 1882 no contract that can be impaired by subsequent legislation, it is of no consequence that the Supreme Court may have given it a wrong construction. "Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired." (*New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79, 88.) Indeed the whole foundation of our jurisdiction in this class of cases must rest upon a *contract* which cannot be legally impaired.

This court has repeatedly held that we cannot revise the judgment of the highest court of a State unless, by its terms, or necessary operation, it gives effect to some provision of a State constitution or law which, as thus construed, impairs the obligation of a precedent contract. In *Railroad Co.* v. *Rock*, (4 Wall. 177, 181,) this court pronounced it a "fundamental error that this court can, as an appellate tribunal, reverse the judgment of a State court, because that court may hold a contract to be void, which this court might hold to be valid." So, too, in *Knox* v. *Exchange Bank*, (12 Wall. 379, 383,) it was said by Mr. Justice Miller: "But we are not authorized by the Judiciary Act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." To the same effect are *Lehigh Water Co.* v. *Easton*, (121 U. S. 388, 392,) and *New Orleans Waterworks* v. *Louisiana Sugar Co.*, (125 U. S. 18, 30.) In the latter case it is said by Mr. Justice Gray: "In order to come within the provision of the Constitution of the United States which declares that no State shall

pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." See also *Central Land Co.* v. *Laidley*, (159 U. S. 103, 109.)

We are therefore of opinion that we cannot review the action of the State court in holding this exemption to have been repealed.

4. A single point with regard to the *privilege* taxes included in the assessment sought to be enjoined remains to be considered.

By section 18 of the company's charter of 1882 it was declared "that such Company, its stock, its railroad and appurtenances, and all its *property* in this State, necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act." This undoubtedly implies an exemption from privilege as well as *ad valorem* taxes, and such has been the construction given to it by the Supreme Court of Mississippi. (*Grand Gulf &c. R. R.* v. *Buck*, 53 Miss. 246.)

But, as we have already held, this section must be construed as subservient to section 13, article XII, of the Constitution of 1869, providing that "the *property* of all corporations for pecuniary profit shall be subject to taxation."

Now, if privilege taxes are taxes upon the *property* of corporations, an exemption from such taxes was subject to repeal as much as we have already held an exemption of *ad valorem* taxes to be.

Whatever may have been the fluctuations of opinion upon this subject, and it is not to be denied that there are many cases in the State courts holding that a privilege tax is not a tax upon property, the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of *Wilmington Railroad* v. *Reid*, (13 Wall. 264,) in which an exemption in the charter of the Wilmington and Raleigh Railway Company of "the property of said company and the shares therein" from taxation, was decided to extend to a tax upon the franchise and rolling stock. In delivering the opinion of this court, Mr. Justice Davis observed: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. The position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with

them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter." To the same effect are *Adams Express Co.* v. *Ohio*, (165 U. S. 195,) and *Veazie Bank* v. *Fenno*, (8 Wall. 533, 547.)

This also appears to be the law in Mississippi. (*Coulton* v. *Harris*, 43 Miss. 728; *Drysdale* v. *Pradat*, 45 Miss. 445.)

In *West River Bridge Co.* v. *Dix*, (6 How. 507, 534,) the franchise of a bridge company was held to be property subject to condemnation under the law of eminent domain. See also *Monongahela Nav. Co.* v. *United States*, (148 U. S. 312;) *Spring Valley Waterworks* v. *Schottler*, (62 Cal. 110;) *Nichols* v. *New Haven &c. Railroad Co.*, (42 Conn. 103, 125;) *Porter* v. *Rockford &c. R. R.*, (76 Ill. 561, 574;) *State* v. *Anderson*, (90 Wis. 561;) *Richmond &c. R. R.* v. *Brogden*, (74 N. C. 707.)

It follows, then, that privilege taxes being taxes upon property are subject to the constitutional limitations of 1869, and their exemption was equally repealable as that of *ad valorem* taxes.

The railroad company also calls attention to section 181 of the Constitution of 1890, by virtue of which "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature." The words "sooner repealed" in this section apparently refer to a repeal before the expiration of the exemption under their respective charters, and as the Supreme Court has held that the exemption in this case was repealed by the Annotated Code of 1892 the company can gain no additional advantage by this section. (*Adams* v. *Tombigbee Mills*, 78 Miss. ——.)

Inasmuch as the statute in question could not, and in the opinion of Supreme Court did not, impair the obligation of any prior contract, its judgment must be.

Affirmed.

Mr. Justice GRAY was not present at the argument and took no part in the decision of this case.

True copy.

Test

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